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June 17

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

ROBERT G. MORROW
REPORTER

VOLUME 33

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OF THE

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*On July first, Eighteen Hundred and Ninety-eight, Judge Wolvertton succeeded Judge Moore as Chief Justice, the latter's term having expired. Judge Moore having been re-elected, became Associate Justice on July first, Eighteen Hundred and Ninety-eight.

†On January first, Eighteen Hundred and Ninety-nine, D. R. N. Blackburn became Attorney-General, having been elected in the preceding June.

TABLE OF CASES REPORTED.

A			
Aachen Insurance Co., First National Bank v.	172	Crowell, Jacksonville School District v.	11
Ash, State v.	86	Cunningham, Freeland v.	414
Assignment of Woodall.	382	D	
B		Day, Lang v.	599
Baker County, Municipal Security Co. v.	338	Dayton v. Board of Equalization.	131
Barnhart v. Ehrhart.	274	Delay, Boles v.	597
Barrett, State v.	194	Dittenhoefer, White v.	601
Barr v. Rader.	375	E	
Bartmess, State v.	110	Ehrhart, Barnhart v.	274
Battmann, Liebe v.	241	Estate of Plunkett.	414
Beardsley, Hargett v.	301	Evans, Fellows v.	30
Bituminous Paving Co., Portland v.	307	Evans, Mullaney v.	330
Black v. Malleis.	601	<i>Ex parte</i> McGee.	165
Blank v. Walker.	372	F	
Board of Equalization, Dayton v.	131	Farmers' Bank v. Key.	443
Boles v. Delay.	597	Farmers' Bank v. Saling.	394
Bond v. Turner.	551	Farmers' National Bank v. Gates.	388
Bottger, Jory v.	599	Fellows v. Evans.	30
Branton, State v.	533	Fire Association, First National Bank v.	172
Breeding v. Williams.	391	First National Bank v. Aachen Insurance Co.	172
Brown, Hayden v.	221	First National Bank v. Commercial Assurance Co.	43
Butler, Hamilton v.	370	First National Bank v. Fire Association.	172
C		First National Bank v. Home Insurance Co.	234
Carson v. Gentner.	512	First National Bank v. Phoenix Insurance Co.	43
Chapman, Commercial National Bank v.	600	Fisk v. Hunt.	424
City of Astoria, Clatsop Mill Co. v.	598	Freeland v. Cunningham.	414
City of Portland v. Bituminous Paving Co.	307	French v. Harney County.	418
Clatsop Mill Co. v. City of Astoria.	598	G	
Cline, Sullivan v.	260	Gardner, State v.	149
Commercial Assurance Co., First National Bank v.	43	Garnsey v. County Court.	201
Commercial National Bank v. Chapman.	600	Gates, Farmers' Nat'l Bank v.	388
Commercial National Bank, Reed v.	599	Gentner, Carson v.	512
Conklin v. La Dow.	354	Gibbons v. Moody.	593
County Court, Garnsey v.	201	Gobbi v. Refrano.	26
Crouter, Huntington v.	408	Graham v. School District.	263

TABLE OF CASES REPORTED.

H		M.	
Hallgarth, Payne v.	430	Mackenzie, Security Savings	
Hamaker, Knight v.	154	Co. v.	209
Hamilton v. Butler	370	Magone, State v.	570
Hargett v. Beardsley	301	Malleis, Black v.	601
Harney County, French v.	418	McAllister v. Long	368
Harper, Mosgrove v.	252	McCourt v. Johns	561
Harper, State v.	524	McFerren, Wheeler v.	22
Hayden v. Brown	221	McGee, <i>Ex parte</i>	165
Hayden v. Pearce	89	McInnis, Jackson v.	529
Hermann v. Hutcheson	239	Medical Board, Miller v.	5
Herren, Hutchcroft v.	1	Miller v. Medical Board	5
Hinkle, State v.	93	Minnick, State v.	158
Home Insurance Co., First		Moody, Gibbons v.	593
National Bank v.	234	Mosgrove, Lieuallen v.	282
Howe, Klamath County v.	598	Mosgrove v. Harper	252
Hull, State v.	56	Mullaney v. Evans	330
Hunt, Fisk v.	424	Municipal Security Co. v. Ba-	
Huntington v. Crouter	408	ker County	338
Hutchcroft v. Herren	1		
Hutcheson, Hermann v.	239	N.	
		Nixon, Patton v.	159
I		O.	
Imbler, Stubblefield v.	446	Olberman, State v.	556
<i>In re</i> Plunkett's Estate	414	Oregon R. R. Co., Townley v.	323
J		P.	
Jackson County, Reynolds v.	422	Parkhurst, Shofner v.	597
Jacksonville School District		Parrish v. Parrish	486
v. Crowell	11	Patton v. Nixon	159
Jackson v. McInnis	529	Payne v. Halgarth	430
Johns, McCourt v.	561	Pearce, Hayden v.	89
Jorgensen, Sweek v.	270	Perham v. Portland Electric	
Jory v. Bottger	599	Co.	451
K		Phoenix Insurance Co., First	
Key, Farmers' Bank v.	443	National Bank v.	43
Kimball v. Redfield	292	Plummer, Lansing v.	600
Kincaid, Sears v.	215	Plunkett's Estate, <i>In re</i>	414
Klamath County, Towns v.	225	Portland Electric Co., Per-	
Klamath County v. Howe	598	ham v.	451
Knight v. Hamaker	154	Portland v. Bituminous Pav-	
		ing Co.	307
L		Price v. Wolfer	15
La Dow, Conklin v.	354		
Lang v. Day	599	R.	
Lansing v. Plummer	600	Rader, Barr v.	375
Lee, Schneider v.	578	<i>Re</i> Assignment of Woodall	382
Lee, State v.	306	Redfield, Kimball v.	292
Levy, Schultz v.	373	Reed v. Commercial National	
Liebe v. Battmann	241	Bank	599
Lieuallen v. Mosgrove	282	Refrano, Gobbi v.	26
Lomax v. Walk	385	Renick, State v.	584
Long, McAllister v.	368	<i>Re</i> Plunkett's Estate	414
		Reynolds v. Jackson County	422

TABLE OF CASES REPORTED.

vii

S.		State v. Smith.....	483
Saling, Farmer's Bank v....	394	State v. Welch.....	33
Schneider v. Lee	578	Stemmer v. Scottish Insur-	
School Dist., Graham v.....	263	ance Co	65
Scottish Insurance Co., Stem-		Strowbridge v. Spaulding....	602
mer v.	65	Stubblefield v. Imbler.....	446
Schultz v. Levy.....	373	Sullivan v. Cline.....	260
Sears v. Kincaid	215	Sweek v. Jorgensen	270
Security Savings Co. v. Mac-			
kenzie	209	T.	
Shofner v. Parkhurst.....	597	Townley v. Oregon R. R. Co.	323
Smith, State v.	483	Towns v. Klamath County...	225
Smith v. Turner	379	Turner, Bond v.	551
Spaulding, Strowbridge v....	602	Turner, Smith v.	379
State v. Ash	86		
State v. Barrett.	194	W.	
State v. Bartmess	110	Walk, Lomax v.	385
State v. Branton	533	Walker, Blank v.	372
State v. Gardner.....	149	Welch, State v.	33
State v. Harper.....	524	Western Assurance Company,	
State v. Hinkle.....	93	Sproul v.	98
State v. Hull.....	56	Wheeler v. McFerren.....	22
State v. Lee	506	White v. Dittenhoefer.....	601
State v. Magone	570	Williams, Breeding v.	391
State v. Minhick.....	158	Wolfer, Price v.	15
State v. Olberman.....	556	Woodall, Re Assignment of..	382
State v. Renick	584		

TABLE OF CASES CITED.

A

		PAGE
Adams v. Morrison	113 N. Y. 152	399
Afferback v. McGovern	79 Cal. 208	295
Alden v. Carver	18 Iowa, 258	296
Alexander v. Municipal Court	66 Cal. 387	207
Alta Land and Water Co. v. Hancock	85 Cal. 219	517
Alvord v. Spring Valley Gold Co.	160 Cal. 547	390
American Exp. Co. v. Pinckney	29 Ill. 392	303
Anderson v. Baughman	7 Mich. 69	224
Angell v. Hartford Ins. Co.	50 N. Y. 171	101
Argenti v. Brannan	5 Cal. 351	333
Armstrong v. Thurston	11 Md. 148	531
Ashmun v. Williams	8 Pick. 402	25
Atchison v. Peterson	87 U. S. 507	517
Athearn v. Independent Dist.	33 Iowa, 105	267
Atwood v. Cobb	16 Pick. 227	449
Ayers v. Watson	137 U. S. 584	280

B

Baas v. Chicago & N. W. Ry. Co.	39 Wis. 296	391
Bachmeyer v. Mutual Association	87 Wis. 325	55
Baile v. St. Joseph Ins. Co.	73 Mo. 371	101, 109
Balsley v. Balsley	15 Or. 183	149, 151
Baker v. Beach	15 Wis. 108	213
Baker v. Boon	100 Ala. 622	153
Baker v. Joseph	10 Cal. 173, 178	51
Ball v. Doud	26 Or. 14	301
Ballard v. Burton	64 Vt. 387	531
Bancroft v. Boston R. R. Corp.	11 Allen, 34	459
Bank of Bethel v. Pahquioque Bank	81 U. S. 383	531
Bank of Winnemucca v. Mullaney	29 Or. 238	375
Bannig v. Bradford	21 Minn. 308	390
Barbre v. Goodale	23 Or. 465	333
Barkley v. Logan	2 Mont. 286	446
Barre v. Council Bluffs Ins. Co.	76 Iowa, 606	105
Basey v. Gallagher	87 U. S. 670	517
Baskett v. Hassell	107 U. S. 602	249
Bates v. Holladay	31 Mo. App. 162	50
Bates v. R. R. Co.	1 Black, 204	282
Battles v. Board	16 R. I. 372	11
Batts v. Winstead	77 N. C. 238	367
Bayly v. London Ins. Co.	2 Fed. Cas. 1087	188
Beach v. U. S.	46 Fed. 754	527
Beadle v. Graham's adm'r.	66 Ala. 102	153
Beaver v. Beaver	117 N. Y. 421-423	245
Beck v. Flournoy Livestock Co.	12 C. C. A. 497	259
Becker v. Becker	45 Iowa, 239	238
Becker v. Malheur Co.	24 Or. 217	144
Belding v. Black Hills R. R. Co.	3 S. D. 369	459
Bell v. Gardner	77 Ill. 819	153
Bell v. Indian Stock Co.	11 S. W. 344	555
Ben v. State	58 Am. Dec. 234	95
Berry v. Charlton	10 Or. 362	373, 374
Bewley v. Graves	17 Or. 174, 274	232, 270, 271
Beck v. Vancouver Ry. Co.	25 Or. 82	478
Bigelow v. Paton	4 Mich. 170	251
Bilyeu v. Smith	13 Or. 335	239, 240
Bingham v. Kern	18 Or. 199	238
Bissell v. Fletcher	19 Neb. 725	280
Bixby v. Whitney	5 Me. 192	82

		PAGE
Blake v. Midland R. R. Co.	18 Queen's Bench, 93	466
Blair v. State	81 Ga. 629	575
Board of Sup'rs. v. Auditor-General	38 Mich. 659, 665	246
Board of Sup'rs. Ia. Co. v. Min. Pt. R. Co.	24 Wis. 121	391
Bolen v. Cumbly	58 Ark. 514	85
Bonesteel v. Orvis	31 Wis. 117	170
Booth v. Moody	30 Or. 222	298, 304, 307
Bowen v. State	1 Or. 271	152
Boyd v. City of Milwaukee	92 Wis. 456	316
Bozeman v. State	34 Tex. Cr. R. 508	199
Bradish v. Bliss	85 Vt. 326	55
Bradshaw v. Agl. Ins. Co.	137 N. Y. 137	75
Bradshaw v. Lancashire R. R. Co.	L. R. 10 C. P. 189	466
Brison v. Brison	75 Cal. 525	494
Britt v. Aylett	52 Am. Dec. 282	295
Broder v. Natoma Water Co.	101 U. S. 274	517, 519, 520
Branson v. Gee	25 Or. 462	230, 233
Brooks v. Douglass	32 Cal. 208	153
Brown v. Buffalo R. R. Co.	22 N. Y. 191	465
Brown v. Goodyear	29 Neb. 376	241
Brown v. Jenks	96 Cal. 10	315
Brown v. Westerfield	47 Neb. 399	437, 442
Buck v. McCaughtry	5 T. B. Mon. 217, 230	568
Burgess v. State	44 Ala. 180	95
Bunneman v. Wagner	16 Or. 483	317
Burbank v. Roots	4 Colo. App. 197	390
Burk v. Edison General Electric Co.	89 Hun. 498	480
Burns v. Grand Rapids R. R. Co.	113 Ind. 169	465
Burnap v. Sharpstien	149 Ill. 225	437
Burnett v. Markley	28 Or. 438	388, 344
Bury v. Young	96 Cal. 446	442
Bush v. Mitchell	28 Or. 92	446
Button v. Schroyer	5 Wis. 598	213

C

California v. San Pablo R. Co.	149 U. S. 308	13
Cal. Land Co. v. Gowen	48 Fed. 775	139
Cal. & Oregon Land Co. v. Gowen	48 Fed. 771	206
Caldwell v. Wilson	2 Spears, 75	251
Cameron v. Wasco Co.	27 Or. 318	270, 273
Campbell v. American Ins. Co.	73 Wis. 100	101, 109
Campbell v. People	61 Am. Dec. 49	127
Campbell v. State	23 Ala. 44	115
Campbell v. Williams	39 Iowa, 648	295
Campbell v. Quinton	4 Kan. App. 317	295
Canfield v. Watertown Ins. Co.	55 Wis. 419	77
Carlisle v. State	73 Miss. 387	199
Carlson v. Or. Short Line, etc., R. R. Co.	21 Or. 450	463, 467, 480
Carlson v. Dixon	12 Or. 148	318
Carr v. Gate	1 Curt. 384	153
Cassel v. Western Stage Co.	12 Iowa, 47	295
Cent. Pac. R. Co. v. Board of Equaliz.	46 Cal. 667	207
Central R. R. Co. v. Dixon	42 Ga. 327	467
Chadwick v. Miller	6 Iowa, 85	300
Chem'l Nat. Bank v. Hartford Dep. Co.	161 U. S. 1	531
Chicago & E. I. Railway Co. v. Hines	132 Ill. 161	304
Chicago R. R. Co. v. Chamberlain	84 Ill. 333	231
Chicago & Rock Island R. R. Co. v. Fell	22 Ill. 333	206
Christy v. Hill	95 Pa. St. 380	491, 505
Citizen's Insurance Co. v. Hamilton	48 Ill. App. 563	77
City of Burlington v. Gilbert	31 Iowa 356	319
City of Covington v. Boyle	6 Bush	204
City of Council Bluffs v. Stewart	51 Iowa 385	348, 350, 350
City Electric Railway Co. v. Conery	61 Ark. 381	482
City of Eureka v. Merrifield	53 Kan. 794	465
City of Indianapolis v. Huffer	30 Ind. 235	183
City of Portland v. Bituminous Pav. Co.	83 Or. 307	353
City of Santa Cruz v. Enright	95 Cal. 105	518
City of Schenectady v. Trus. U. College	60 Hun. 179	316
City of St. Louis v. Davidson	102 Mo. 149	322
Clark v. Flisk	9 Utah 97	390
Clements v. Louisiana Elec. Light Co.	44 La. Ann. 692	472

TABLE OF CASES CITED.

xi

		PAGE
Clifford v. Richardson	18 Vt. 620	181, 184
Clinton v. Howard	42 Conn. 204-306	182
Close v. Close	28 Or. 109	422
Coffin v. Hutchinson	22 Or. 554	173, 198
Cole v. People	161 Ill. 16	316
Collins v. Evans	15 Pick. 63	235
Com. Mut. Ins. Co. v. Union Mut. Ins. Co.	60 U. S. 318	101
Com. v. Boston and Alt. R. R. Co.	121 Mass. 36	467
Commonwealth v. Brown	12 Gray 136	541
Commonwealth v. Darsey	108 Mass. 412	196
Commonwealth v. Griffin	8 Cush. 523	541
Com. v. Parker	2 Pick. 550	596
Commonwealth v. Roby	12 Pick. 496	578
Commonwealth v. Speer	2 Va. Cas. 67	580
Com. v. Sturtevant	117 Mass. 122	181
Commonwealth v. Warren	6 Mass. 72	590, 591
Com. v. Symonds	2 Mass. 163	95
Connell v. Gallagher	36 Neb. 740	414
Connors v. Burlington R. R. Co.	71 Iowa, 490	466
Connor v. People	18 Colo. 373	33
Connor v. Trawick's Admr.	37 Ala. 239	245
Consaul v. Sheldon	35 Neb. 247-254	50
Cook v. Croisan	25 Or. 475	395, 406
Cook v. Independent School Dist.	40 Iowa, 444	268
Cooper v. McClum	16 Ill. 435	337
Cooper v. Reynolds	77 U. S. 316	136
Cooper v. State	120 Ind., 390	596
Coombs Com. Co. v. Block	130 Mo., 663, 668	228
Corcoran v. Boston & Atl. R. R. Co.	133 Mass. 507	459
Covington R. Co. v. Mayor of Athens	35 Ga. 367	322
Craft v. Dallas City	21 Or. 53	110, 125
Crafts v. Dexter	42 Am. Dec. 666	418
Crane v. Bennington School Dist.	61 Mich. 299	268
Crary v. Campbell	24 Cal. 694	19
Crawford v. Abraham	2 Or. 163	463
Crawford v. Linn Co.	11 Or. 484	148
Crawford v. Roberts	8 Or. 325	446
Crawford v. Wist	26 Or. 596	370, 371
Croft v. Hanover Insurance Co.	40 W. Va. 508	101
Curtis v. La Grande Water Co.	20 Or. 34	517
Curtiss v. Hoyt	19 Conn. 154	25
Cutcomb v. Utt	60 Iowa, 156	13

o

D

Daly v. Larsen	29 Or. 535	391, 394
Danforth v. Carter	4 Iowa, 230, 236	402
Daniels v. Tearney	102 U. S. 415	318
Davless Co. v. Dickinson	117 U. S. 657	353
Darlington's Appeal	36 Pa. St. 512	463
David v. Waters	11 Or. 443	246
Davidsburgh v. Knickerbocker Ins. Co.	60 N. Y. 523	136
Davis v. Henry	121 Mass. 150	76
Davis v. State	51 Neb. 301	37
Day v. Graham	1 Gillman, 435	30
Day v. Holland	15 Or. 464	154, 157
Dayton v. Board of Equalization	33 Or. 131	202, 206
De Grove v. Metropolitan Ins. Co.	61 N. Y. 564	107
De Wolf v. Pratt	42 Ill. 198	548
Decker v. Gardner	124 N. Y. 334	531
Delmotte v. Taylor	1 Redf. Sur. 417	251
Denham v. Commissioners	106 Mass. 202	232
Dewey v. Frank	62 Cal. 343	153
Dekeaschled v. Exchange Bank	28 W. Va. 340	250
Dobbins v. Hyde	37 Mo. 114	337
Dodge v. Brittain	— Meigs, 88	63
Dodworth v. Jones	4 Duer, 201	295
Doe v. Knight	11 E. C. L. 632	437
Dominick v. State	40 Ala. 680	575
Donahue v. Will Co.	109 Ill. 94	139
Doyle v. Sturla	38 Cal. 456	153
Dray v. Dray	21 Or. 59	493
Drury v. Young	58 Md. 546	450

		PAGE
Duchess of Kingston's case.....	20 How. St. Trials.....	355, 365
Dunbar v. Dunbar.....	80 Me. 152.....	251
Dunn v. Hewitt.....	2 Denio 637.....	18
Dutcher v. Culver.....	23 Minn. 415.....	157

E

Eames v. Home Ins. Co.....	94 U. S. 621.....	101, 105
Earl of Bandon v. Becher.....	3 Clark & F., 479.....	865
Earl of De Witt.....	6 Allen, 520.....	32
Egerton v. Mathews.....	6 East, 307.....	450
Ellicott v. Coffin.....	106 Mass. 365.....	78
Ellis v. Buzzell.....	60 Me. 209.....	55
Ennis v. Ennis.....	110 Ill. 78.....	207
Ennis v. Gray.....	87 Hun. 355.....	474
Evans v. Christian.....	4 Or. 375.....	208
Evans v. Lipscomb.....	31 Ga. 71.....	251
Evarts v. Stuger.....	5 Or. 147.....	301, 304
Eureka Ins. Co. v. Robinson.....	56 Pa. St. 256.....	104, 110
Ex parte Kelley.....	28 Cal. 415.....	170, 172

F

Fain v. Smith.....	14 Or. 82.....	430, 437
Farmers' Loan Co. v. Or. Pac. R. R. Co.....	31 Or. 237.....	531
Farmers' National Bank v. Greene.....	20 C. C. A. 500.....	238
Fehler v. Gosnell.....	99 Ky. 380.....	316
Fenton v. Blair.....	11 Utah, 78.....	347
Fenton v. Scott.....	17 Or. 190.....	383
Ferguson v. Crawford.....	70 N. Y. 253.....	413
Ferguson v. Hubbell.....	97 N. Y. 507.....	101, 184
Ferguson v. Landram.....	5 Bush, 230; 96 Am. Dec. 350.....	318
Ferry v. Laibe.....	31 N. J. Eq. 566.....	367
Finley v. State.....	61 Ala. 201.....	566
Fireman's Insurance Co. v. Kuessner.....	164 Ill. 275.....	106
Fisher v. Oregon Short Line Ry. Co.....	22 Or. 533.....	172, 181
First Nat. Bank v. Com. Union Ass. Co.....	52 Pac. 1050.....	180
First Nat. Bank v. Fire Association.....	33 Or. 172.....	194, 196
First Nat. Bank v. Phenix Assur. Co.....	52 Pac. 1050.....	180
Fleishman v. Collier.....	47 Ga. 253.....	403
Flint v. Phipps.....	16 Or. 437.....	430, 437
Flood v. Western Union Teleg. Co.....	131 N. Y. 603.....	478
Foley v. Crow.....	37 Md. 61-60.....	568, 569
Foster v. Coleman.....	10 Cal. 278.....	352
Fox v. Hazelton.....	10 Pick. 275.....	74
Fredricks v. Tracy.....	98 Cal. 658.....	285
Freeland v. People.....	16 Ill. 380.....	575
Freeman v. Burks.....	16 Neb. 328.....	241
Freeson v. Bissell.....	68 N. Y. 108.....	212
Frizell v. White.....	27 Miss. 198.....	285
Fulton v. Frandollg.....	63 Tex. 330.....	280
Fuller v. Madison Ins. Co.....	36 Wis. 603.....	107
Fuller v. Shedd.....	161 Ill. 462.....	280
Funkhouser v. How.....	24 Mo. 44.....	337

G

Gage v. Wilson.....	17 Me. 378.....	21
Gano v. Fisk.....	43 Ohio St. 462.....	246
Gee v. Moss.....	68 Iowa, 318.....	153
Gelb v. Enterprise Co.....	1 Dill. 449.....	108
Girardi v. Electric Improvement Co.....	107 Cal. 120.....	473, 482
Givens v. Kentucky Central R. R. Co.....	80 Ky. 231.....	400-405
Glaze v. Whitley.....	5 Or. 160.....	48
Gleason v. Martin White Mining Co.....	13 Nev. 223.....	442
Glenn v. Jeffrey.....	75 Iowa 20.....	280
Goddard v. King.....	40 Minn. 161.....	76
Godfrey v. Douglas Co.....	28 Or. 446.....	144

TABLE OF CASES CITED.

xiii

		PAGE
Goelz v. Goelz.....	157 Ill. 83-45.....	504
Gold v. Sun Insurance Co.....	73 Cal. 217.....	106, 109
Gowan v. Jackson.....	20 Johns 176.....	408
Graham v. Hamilton.....	25 N. C. 381.....	20
Graham v. Larmer.....	87 Va. 222.....	567
Graham v. Pennsylvania Co.....	139 Pa. St. 149, 158.....	181-196
Granger v. Swart.....	1 Woolw. 88-90.....	280
Grant v. City of Davenport.....	36 Iowa 396.....	348
Grant County v. Lake County.....	17 Or. 458.....	343, 398
Graves v. Colwell.....	90 Ill. 612.....	55
Great West. M. Co. v. Woodmas M. Co. 12	Col. 46.....	413
Green v. Carlill.....	4 Ch. Div. 882.....	251
Greeley v. Quimby.....	22 N. H. 385.....	21
Greenlow v. State.....	4 Humph. 25.....	95
Griffin v. United Electric Light Co.....	164 Mass. 492.....	476
Gulle v. Wong Fook.....	13 Or. 577.....	292, 294

H

Haben v. Lane.....	45 Miss. 606.....	153
Haight v. Kimbark.....	51 Iowa 13.....	329
Hall v. Norwalk Insurance Co.....	57 Conn. 105.....	77
Hamilton v. Harwood.....	113 Ill. 154.....	207
Hamilton v. Manhattan Railway C.....	9 N. Y. Supp. 313.....	50
Hamilton v. Rogers.....	67 Mich. 135.....	413
Hamlin v. Kassafer.....	15 Or. 456, 263.....	270
Handley v. Jackson.....	31 Or. 552.....	413
Hannibal R. R. Co. v. Morton.....	27 Mo. 317.....	231
Hardin v. Jordan.....	140 U. S. 406.....	280
Hardwick v. State Ins. Co.....	20 Or. 547, 557.....	109, 99
Harkness v. Russell.....	118 U. S. 603.....	582
Harrell v. State.....	22 Tex. App. 692.....	596
Harrison v. Talbot.....	2 Dana, 258.....	567
Haskill v. Andros.....	4 Vt. 609.....	553
Hart v. Kennedy.....	47 N. J. Eq. 51.....	77
Hartf. Fire Ins. Co. v. Bonner Mer. Co. 44	Fed. 151.....	82
Hartman v. Young.....	17 Or. 150.....	393
Hartshorn v. Assessors.....	60 Me. 276.....	219
Hatch v. Atkinson.....	56 Me. 324.....	246
Hawley v. Dawson.....	16 Or. 344.....	66, 83, 379, 381
Hayes v. State.....	58 Ga. 35.....	558
Hays v. People.....	1 Hill 351.....	509
Haynes v. Raleigh Gas Co.....	114 N. C. 203.....	482
Hazen v. Lerche.....	47 Mich. 626.....	266, 269
Hector v. Boston Electric Light Co.....	161 Mass. 558.....	478
Henschal v. Mamero.....	120 Ill. 660.....	494
Herbert v. Dufur.....	23 Or. 462.....	376
Hewey v. Nourse.....	54 Me. 256.....	287
Hice v. Orr.....	16 Wash. 163.....	14
Hicks v. Cram.....	17 Vt. 449.....	399, 402
Higgins v. Dewey.....	107 Mass. 494.....	287
Hills v. Goodyear.....	4 Lea, 242.....	54
Hill v. Loomis.....	6 N. H. 263.....	555
Hine v. Beldon.....	27 Conn. 384.....	170
Hitchcock v. Galveston.....	96 U. S. 341.....	320
Hinson v. Bailey.....	73 Iowa 544.....	442
Hitchcock v. Moore.....	70 Mich. 112.....	52
Hackett v. Baltimore, etc., Ry. Co.....	35 N. H. 390.....	196
Hawley v. Jette.....	10 Or. 31.....	531
Hoffman v. Lynburn.....	104 Mich. 494.....	138
Hoffmire v. Martin.....	29 Or. 240.....	430, 442
Hogan v. Hoyt.....	37 N. Y. 300.....	170
Holland v. Brown.....	35 Fed. 43.....	464
Holloway v. School Dist.....	62 Mich. 153.....	269
Holly v. Heiskell.....	112 Cal. 174.....	296
Holly v. State.....	55 Miss. 424.....	127
Home Ins. Co. v. Favorite.....	46 Ill. 283.....	106
Hosford v. Logus.....	13 Or. 130.....	29
Hoskins v. Hight.....	95 Ala. 284.....	153
Houghton v. Beck.....	9 Or. 325.....	238
House v. Jackson.....	24 Or. 89.....	221, 235
Howery v. Hoover.....	97 Iowa, 581.....	3, 7

		PAGE
Hubbard v. Hartford Ins. Co.	83 Iowa, 325	106
Huchberger v. Merchant's Ins. Co.	4 Biss. 265	55
Hughes v. Clemens	26 Or. 440	29
Hughes v. Holman	23 Or. 481	383
Hunt v. Hunt	72 N. Y. 229	135
Hurlbert v. City of Topeka	34 Fed. 510	404
Hutchinson v. Crutcher	98 Tenn. 421	532
Huxley v. Rice	40 Mich. 73	492
Hyslop v. Finch	99 Ill. 171	139

I

Illingsworth v. Boston Elec. Light Co.	161 Mass. 588	476
Ill. Cent. R. R. Co. v. Pendergrass	99 Miss. 425	459
Insurance Co. v. Colt	87 U. S. 500	101
Innis v. The Senator	4 Cal. 5	183
Improvement Co. v. Coon	10 Wkly Notes Cas. 502	184
Ingraham v. Martin	15 Me. 373	295
In re Crawford	113 N. Y. 565	245
In re Haake	2 Sawy. 231	347
Irvin v. State	7 Tex. App. 78	575

J

Jackson v. Warford	7 Wend. 62	153
James v. Howell	41 Ohio St. 696	230
Jenkins v. Merriweather	109 Ill. 647	30
Jensen v. Crevier	33 Minn. 372	414
Jenson v. Foss	24 Or. 158	308, 370
Jennison v. Kirk	98 U. S. 453	517
Johnson v. Dodgson	2 Mees. & W. 653	450
Johnson v. Noble	38 Am. Dec. 485	80
Johnson v. Gregory	4 Wash. 100	413
Johnson v. Weatherwax	9 Kan. 75	318
Johnston v. Or. Short Line Ry. Co.	23 Or. 94	193, 173
Jones v. Adams	19 New. 78	520
Jones v. Van Doren	130 U. S. 684	498
Jones v. Greaves	28 Ohio St. 6	55

K

Kansas City, etc. R. R. Co. v. Gough	35 Kan. 1	555
Kean v. Mitchell	13 Mich. 206, 212	307
Kearney v. Boston R. R. Corp.	9 Cush. 108	459, 400
Keener v. State	63 Am. Dec. 209	127
Kelly v. Highfield	15 Or. 277	125
Kemp v. State	11 Hump. 320	63
Kerley v. Hume	3 T. B. Mon. 181	300
Kidwell v. State	35 Tex. Cr. 264	199
Kimball v. Supervisors	46 Cal. 19	230
King v. Cox	68 Ark. 204	101
King v. Carpenter	37 Mich. 364	497
Kirkwood v. Washington County	39 Or. 598	201, 205
Kitcherside v. Myers	10 Or. 21	338, 343
Klein v. Ins. Co.	3 Ont. 234-261	106
Knahla v. Oregon Short Line Ry. Co.	21 Or. 136, 142	282, 286
Knight v. Hamaker	33 Or. 154	203, 204
Koshland v. Home Ins. Co.	31 Or. 321	96, 106
Koshland v. Hartford Ins. Co.	3 Or. 402	96, 106
Krall v. United States	24 C. C. A. 543	522
Krewson v. Furdum	15 Or. 589	324, 330
Kumli v. Southern Pacific Co.	21 Or. 505	556, 558

L

Ladd v. Foster	12 Sam. 547	490
Ladd v. Mason	10 Or. 308	561, 566
Lammers v. Nissen	4 Neb. 245	230

TABLE OF CASES CITED.

xv

	PAGE
Landon v. Burke.....	36 Wis. 378..... 213
Langevin v. City of St. Paul.....	49 Minn. 189..... 92
Langford v. Jones.....	18 Or. 307..... 110, 115, 370
Langstaff v. Miles.....	5 Mont. 551..... 160
Latah Co. v. Peterson.....	2 Idaho, 1118..... 232
Latimer v. Tillamook Co.....	22 Or. 291..... 270, 273
Lawrence v. Lane.....	4 Gilman, 354..... 337
Lee v. Fox.....	113 Ind. 98..... 387
Lee v. State.....	92 Ala. 15..... 130
Lent v. Tillson.....	72 Cal. 404..... 233
Leonard v. Robbins.....	13 Allen, 217..... 92
Le Roy v. Shaw.....	2 Duer, 626..... 92
Lewis v. Hawkins.....	90 U. S. 119..... 212
Lewis v. Larson.....	45 Wis. 353..... 207
Lincoln v. Wright.....	4 De Gex & J., 16..... 493
Lipmans v. Niagara Ins. Co.....	121 N. Y. 454..... 107
Little v. Bowers.....	134 U. S. 547..... 13
Loan Association v. Topeka.....	87 U. S. 655..... 353
Lord v. Veazie.....	49 U. S. 251..... 13
Lott v. State.....	18 Tex. App. 627..... 506
Love v. People.....	160 Ill. 508..... 63
Lowe v. Stringham.....	14 Wis. 241..... 554
Lucas v. N. Y. Central R. R. Co.....	21 Bart. 245..... 467
Lung Chung v. Northern Pac. R. R. Co.....	10 Saw. 17..... 464
Lux v. Haggin.....	60 Cal. 255..... 520
Lynes v. State.....	36 Miss. 617..... 98
Lyon v. Green Bay R. R. Co.....	42 Wis. 588..... 231

M

Magin v. Lamb.....	43 Minn. 80..... 413
Maier v. Boston & Atl. R. R. Co.....	158 Mass. 89..... 459
Manning v. Phippen.....	11 Am. St. Rep. 46..... 494
Manufacturers' Ind. Co. v. Dorgan.....	7 C. C. A. 581..... 196
Marsh v. Fulton Co.....	77 U. S. 676..... 353
Marshall v. Bunker.....	40 Iowa, 121..... 295
Martin v. Carlin.....	19 Wis. 454..... 280
Martin v. Flaharty.....	13 Mont. 96..... 437
McAlliley v. Norton.....	75 Ala. 491..... 139
McAllister v. City of Tacoma.....	9 Wash. 272..... 313
McComas v. State.....	11 Mo. 116..... 510
McCann v. Aetna Insurance Co.....	3 Neb. 188..... 101
McCarthy v. Chicago, etc., R. R. Co.....	18 Kan. 46..... 465
McCord's Administrator v. McCord.....	77 Mo. 166..... 246
McDermott v. Isbell.....	4 Cal. 113..... 313
McDonald v. Bacon.....	4 Ill. 423..... 82
McDonald v. Mayor of New York.....	68 N. Y. 23..... 323
McDonald v. Mining Co.....	13 Cal. 220..... 333
McGahagin v. State.....	17 Fla. 665..... 95
McIndoe v. Morman.....	26 Wis. 588..... 213
McInroy v. Dyer.....	47 Pac. St. 118..... 238
McLaughlin v. Louisville Electric Co.....	Ky. L. Rep. 603..... 475
McMullan v. Edison Electric Co.....	13 Miss. 392..... 479
McNarra v. Chicago & N. W. Ry. Co.....	41 Wis. 69..... 323
McNeese v. State.....	19 Tex. App. 43..... 506
McQuaid v. Portland Railroad Co.....	19 Or. 535..... 422, 423
Mead v. Husted.....	52 Conn. 55..... 55
Mendenhall v. Harrisburg Water Co.....	27 Or. 38..... 395
Mendenhall v. Water Co.....	27 Or. 38..... 405
Menzie v. Kelly.....	8 Ill. App. 251..... 555
Michigan National Bank v. Stanton.....	55 Minn. 211..... 25
Miles v. Miles.....	6 Or. 298..... 388, 390
Miller v. Jeffress.....	4 Grat. 472..... 250
Miller v. McClain.....	10 Yerg. 245..... 337
Mills v. Green.....	150 U. S. 651..... 13
Mineral Point Railroad Co. v. Barron.....	83 Ill. 365..... 555
Minter v. Durham.....	13 Or. 470..... 292, 297
Miner's Ditch Co. v. Zellerbach.....	37 Cal. 543..... 323
Missouri Pac. R. R. Co. v. Bennett.....	5 Kan. App. 231..... 465
Missouri Pac. Ry. Co. v. Maltby.....	34 Kan. 125..... 555
Mobile Ins. Co. v. McMillan.....	31 Ala. 711..... 101
Morgan v. State.....	34 Tex. 677..... 577

		PAGE
Moody v. Richards	29 Or. 282	391, 394
Moore v. Crawford	130 U. S. 122	493
Moore v. Mayor, etc., of City of N. Y.	73 N. Y. 245	320
Moore v. Robbins	96 U. S. 530	258
Moore v. State	17 Ohio St. 521	509
Moore v. Town Council	32 Fed. 498	413
Morris v. Hoyt	11 Mich. 9	212
Morris v. Ross	2 Hen. & M. 408	77
Morrow v. State	57 Miss. 836	199
Moser v. Jenkins	5 Or. 417	292, 294
Mosness v. German Ins. Co.	50 Minn. 341	77
Morton v. White	18 Me. 53	21
Mulcahey v. Washburn Wheel Co.	145 Mass. 281	459
Muldick v. Galbraith	49 Pac. 886	395
Murphy v. New York R. R. Co.	30 Conn. 184	465
Murray v. Murray	6 Or. 17	370
Myers v. Liverpool Ins. Co.	121 Mass. 338	101
Nash v. City of St. Paul	8 Minn. 172	323
Nashville R. R. Co. v. Prince	2 Hiesk. 560	466
Nebraska Ins. Co. v. Selvers	27 Neb. 540	106
Neppach v. Jones	28 Or. 286	422, 424
Newark Machine Co. v. Kenton Ins. Co.	50 Ohio St. 549	107
Newberg v. Fox	37 Minn. 141	320
Newcomb v. State	37 Miss. 383, 402	50
Newell v. Newell	14 Kan. 202	494
New England Glass Co. v. Lowell	7 Cush. 319	180
Newsom v. Jackson	26 Ga. 241	21
N. Y. Wood Working Co. v. Schnelder	119 N. Y. 475	81
Nichols v. Fayette Ins. Co.	1 Allen. 63	108
Niekum v. Gaston	24 Or. 380	368, 370
Noble v. Epperley	6 Ind. 414	235
Noble v. Smith	2 Johns. 52	246
N. P. Terminal Co. v. City of Portland	14 Or. 24	226, 231
Norton v. Shelby Co.	118 U. S. 425	353
Noyes v. Hillier	65 Mich. 636	413
Nunn v. Goodlett	10 Ark. 89	318
Nutt v. Southern Pacific Co.	25 Or. 291	172, 180
Nutter v. Taylor	78 Me. 424	76

O

Odell v. Gotfrey	13 Or. 466	29
Ogden v. Davidson	81 Va. 757	413
O'Hara v. Parker	27 Or. 157	388, 343
Oliver v. Herron	106 Ala. 639	153
O'Meara v. State	17 Ohio St. 515	509
Order of Mutual Aid v. Paine	122 Ill. 625, 628	303
Oregon & Cal. R. R. Co. v. Lane Co.	23 Or. 386	144
Oregon & Cal. R. R. Co. v. Croisan	22 Or. 400	142
Oregon & Cal. R. R. Co. v. Croisan	22 Or. 393	136
Oregon Mtg. Sav. Bank v. Jordan	16 Or. 113	144
Oregon Pottery Co. v. Kern	30 Or. 328	324, 329
Owens v. Ranstead	22 Ill. 161	413

P

Palmer v. Bank of Zumbrota	65 Minn. 90	138
Parker v. Boston, etc. Steamboat Co.	109 Mass. 449	196
Parker v. Child	25 N. J. Ex. 41	214
Parker v. Metzger	12 Or. 407	30, 33
Parker v. Newitt	18 Or. 274, 23 Pa. 246	486, 504
Patterson v. Doe	8 Blackf. 237	21
Payne v. State	60 Ala. 80	127
Pendleton v. Saunders	19 Or. 9	183
Pengra v. Wheeler	24 Or. 582	66, 83, 379, 381
Penniman v. Hartshorn	13 Mass. 87	450
People v. Aleck	61 Cal. 137	98
People v. Bemmerly	98 Cal. 299	500
People v. Clark	84 Cal. 573	126
People v. Common Council of Troy	82 N. Y. 575	14
People v. Dempsey	66 How. Prac. 371	159

TABLE OF CASES CITED.

xvii

		PAGE
People v. District Court	18 Col. 28	220
People v. Doyell	48 Cal. 85	138
People v. Dwinelle	20 Cal. 632	207
People v. English	52 Cal. 212	90
People v. ex rel. Salomon	46 Ill. 343	138
People v. ex rel. Brooks	57 Ill. 142	219
People v. Garbutt	97 Am. Dec. 162	127
People v. Germaine	101 Mich. 485	198
People v. Gray	61 Cal. 164	126
People v. Hopt	4 Utah, 247	182
People v. Hurtado	63 Cal. 288	128
People v. Jacobs	49 Cal. 384	115
People v. Kernaghan	72 Cal. 609	128
People v. Maher	56 Hun. 81	316
People v. McCurdy	68 Cal. 576	128
People v. McGaffey	23 Col. 156	220
People v. Morine	61 Cal. 387	126
People v. Moore	45 Cal. 19	98
People v. Nelson	56 Cal. 77	126
People v. O'Brien	66 Cal. 602	121, 123
People v. Owyhee Mining Co.	1 Idaho, 409	142
People v. Rozelle	78 Cal. 84	122
People v. Snyder	44 Hun. 193	159
People v. Stone	9 Wend. 18	586
People v. Welch	49 Cal. 174	128
People v. Wright	9 Wend. 193	95
Peterson v. Lodwick	44 Neb. 771	295
Phelps v. Piper	48 Neb. 724	220
Peck v. States	68 Ala. 201	596
Pierce v. Perkins	17 N. C. 250	77
Pittsburg & St. Louis R. R. Co. v. Culver	60 Ind. 469	288
Pittsburg & St. Louis R. R. Co. v. Hixon	79 Ind. 111	288
Port Huron Ry. Co. v. Callanan	61 Mich. 22	76
Porter v. Gile	44 Vt. 520	248
Porter v. Pequomock Mfg. Co.	17 Conn. 249	182
Portland Construction Co. v. O'Neill	24 Or. 51	66, 85
Portland Lum. Co. v. City of E. Portland	18 Or. 21	317, 321
Poor v. Gibson	32 N. H. 415	278
Powell v. Dayton, etc., R. R. Co.	14 Or. 22	283, 291
Pritchard v. Daly	73 Ill. 523	82
Pritchett v. State	58 Am. Dec. 250	127
Provart v. Harris	150 Ill. 40	437
Pym v. Great Northern R. R. Co.	4 B. & S. 206	463

Q

Quinn v. Loyd	41 N. Y. 349	238
Quincy Coal Co. v. Hood	77 Ill. 68	803

R

R. R. Co. v. Shurmelt	74 U. S. 272	280
Railroad Co. v. Stewart	39 Iowa 267	319
Ramp v. Marion County	24 Or. 461	144
Ramsey v. Pettengill	14 Or. 207	208
Randall v. Collins	58 Tex. 231	414
Rash v. State	61 Ala. 89	195
Reg. v. Chapman	8 Car. & P. 558	198
Rex v. Govers	Sayer, 200	587
Reg. v. Grantham	11 Mod. 222	590
Reg. v. Holden	8 Car. & P. 606	198
Reg. v. Jennison	9 Cox. Cr. Cas. 158	591
Reg. v. London, C. & D. Ry. Co., L. R.	3 Q. B. 170	169
Reg. v. Macarty	6 Mod. 301	587, 588
Reg. v. Stroner	1 Car. & K. 650	198
Re Manning	139 N. Y. 446	14
Reed v. Allison	61 Cal. 461	429
Rees v. Livingstone	41 Pa. St. 113	238
Rex v. Bower	1 Camp. 323	501
Rex v. Hanson	Sayer, 229	586, 589
Rex v. Jones	1 Leach, 174	586
Reynolds v. Jackson Co.	83 Or. 422	372

	PAGE
Rich v. Husson.....	1 Duer, 617..... 160
Ridden v. Thrall.....	125 N. Y. 572..... 244
Riley v. Conn. River R. R. Co.....	135 Mass. 292..... 450
Roach v. Consolidated Mining Co.....	7 Savoy 224..... 465
Robbins v. Harrity.....	2 Pa. Dist. R. 163..... 220
Roberts v. Parrish.....	17 Or. 583..... 198
Roberts v. State.....	58 Am. Dec. 537, 540..... 574, 576, 577
Robinson v. Oceanic Navigation Co.....	112 N. Y. 315..... 136
Rogers v. Hule.....	1 Cal. 429..... 153
Rogers v. Woodbury.....	15 Pick 156..... 25
Rosendorf v. Baker.....	8 Or. 240..... 578, 581
Rothschild v. American Cent. Ins. Co.....	62 Mo. 356..... 55
Rothschild v. Insurance Co.....	62 Mo. 356..... 190
Ruble v. State.....	51 Ark. 170..... 575
Rundell v. Butler.....	10 Wend. 119..... 238
Ryan v. Dox.....	34 N. Y. 307..... 493

S

Salem-Bedford Stone Co. v. Hobbs.....	11 Ind. App. 27..... 478
Salem-Bedford Stone Co. v. O'Brien.....	12 Ind. App. 217..... 478
Salem Water Co. v. City of Salem.....	5 Or. 29..... 339, 350
Sallsburg v. Hekla Insurance Co.....	32 Minn. 458..... 107
Salmon Falls Mfg. Co. v. Goddard.....	55 U. S. 446..... 450
Salomon v. Cress.....	22 Or. 177..... 308, 370
Sanders v. State.....	105 Ala. 4..... 118
San Diego School Dist. v. Board Sup'rs.....	97 Cal. 438..... 15
San Francisco v. Lawton.....	18 Cal. 465..... 390
Schaefer v. Stein.....	29 Or. 147..... 173, 193
Schrott v. Phillippi.....	3 Or. 484..... 208
Schurmeier v. St. Paul Railroad Co.....	10 Minn. 82..... 282
Schofield v. Whitelegge.....	49 N. Y. 259..... 297
Scott v. Home Insurance Co.....	1 Dill 105..... 55
Scott v. Methodist Church.....	50 Mich. 532..... 269
Scott v. State.....	64 Ind. 400..... 38
Seaman v. Hogeboom.....	21 Barb. 398..... 224
Sears v. Seattle Street Ry. Co.....	6 Wash. 227..... 183
Seckell v. Fletcher.....	53 Iowa, 330..... 400
Seely v. Howard.....	18 Wis. 336..... 212
Seligmann v. Heller Clothing Co.....	67 Wis. 410..... 507
Selph v. State.....	22 Fla. 538..... 199
Seward v. The Vera Cruz.....	L. R. 10 App. Cas. 50..... 459, 468
Shaver v. Starrett.....	4 Ohio St. 494..... 232
Shaw v. Helsey.....	48 Iowa, 468..... 214
Shedden v. Patrick.....	1 Macq. 619..... 365
Sheppard v. Yocum.....	10 Or. 402, 408..... 33, 40, 42, 43, 48, 417
Sheppard v. Yocum.....	11 Or. 234..... 446
Shipp v. Suggett.....	9 B. Mon. 5..... 153
Shields v. Jacob.....	88 Mich. 164..... 220
Shmit v. Day.....	27 Or. 110..... 168
Shoemaker v. Hatch.....	13 Nev. 261..... 280
Sims v. Daniels.....	57 Kan. 552..... 220
Singer Manufacturing Co. v. Wright.....	141 U. S. 606..... 18
Singer Manufacturing Co. v. Graham.....	8 Or. 17..... 578, 581
Slocum v. Bracy.....	56 Minn. 249..... 32
Sloper v. Carey.....	9 Or. 511..... 239, 241
Smith v. Bank.....	5 Pet. 518..... 170
Smith v. Ferguson.....	90 Ind. 229..... 246
Smith v. Sherwood.....	95 Wis. 558..... 558
Smith v. State Insurance Co.....	64 Iowa, 716..... 106
Smith v. Winston.....	10 Mo. 180..... 300
Sneathen v. Sneathen.....	104 Mo. 201..... 442
Sproul v. McCoy.....	26 Ohio St. 577..... 555
Stanley v. Smith.....	15 Or. 505..... 110, 125
Starkweather v. Morgan.....	15 Kan. 274..... 414
State v. Abrams.....	11 Or. 169..... 110, 121, 123, 510
State v. Abrahams.....	71 Am. Dec. 399..... 96
State v. Adams.....	78 Iowa, 292..... 118
State v. Adams.....	115 N. C. 775..... 68
State v. Allen.....	43 Neb. 651..... 220
State v. Anderson.....	10 Or. 148..... 110, 126
State v. Arnold.....	48 Iowa, 566..... 98
State v. Bacon.....	13 Or. 143..... 37, 126

TABLE OF CASES CITED.

xix

		PAGE
State v. Becker	12 Or. 318	152
State v. Beuerman	53 Pac. 874	558
State v. Bollinger	60 Mo. 577	150
State v. Brown	28 Or. 147	550, 558
State v. Bruce	5 Or. 68	508
State v. Cain	20 W. Va. 679	109
State v. Carver	22 Or. 602	111, 131
State v. Collyer	17 Nev. 275	506
State v. Clements	15 Or. 287	152
State v. Covington	2 Ball. 500	65
State v. Cucuel	31 N. J. Law, 249	580
State v. Delyon	1 Bay, 353	500
State v. Doe	14 Minn. 35	38
State v. Dodson	4 Or. 64	127
State v. Doty	5 Or. 491	508
State v. Downs	91 Mo. 19	127
State v. Drake	11 Or. 306	152
State v. Duncan	64 Mo. 262	98
State v. Eaton	75 Mo. 587	199, 200
State v. Elder	65 Ind. 282	573
State v. Ellsworth	30 Or. 145	33, 40
State ex rel. v. Craft	18 Or. 550	324, 330
State ex rel. v. Dodge County	56 Wis. 79	189
State ex rel. v. Johnson	105 Ind. 463	234
State ex rel. v. Metschan	32 Or. 372	283, 291
State ex rel. v. Mobile Ry. Co	59 Ala. 321	219
State ex rel. v. Stark	75 Mo. 586	318
State ex rel. v. Stewart	74 Wis. 620	234
State v. Fitzhugh	2 Or. 227	152
State v. Folwell	14 Kan. 105	182, 184
State v. Foot You	24 Or. 61	150
State v. Gallo	18 Or. 423	110, 124, 125
State v. Gapen	17 Ind. App. 254	574
State v. Geddes	55 Pac. 919	542
State v. Gifford	58 Pac. 700	541
State v. Hansen	25 Or. 391	110, 123
State v. Hatcher	29 Or. 309	524, 527
State v. Hayden	45 Iowa, 11	118
State v. Hopkins	14 Wash. 59	347
State v. Horne	20 Or. 485	506, 509, 510
State v. Howe	27 Or. 18	570, 573, 576
State v. Jarvis	18 Or. 390	93, 95, 509
State v. Kirk	10 Or. 505	533, 540
State v. Lane	78 N. C. 547	159
State v. Lawrence	12 Or. 237	594, 596
State v. Lurch	12 Or. 99	110, 121, 123
State v. Mack	20 Or. 231	422, 423
State v. Mackey	12 Or. 154	152
State v. Magone	32 Or. 206	93, 97
State v. Martin	2 Ired. 101	199
State v. Martin	76 Mo. 337	575
State v. McCann	16 Wash. 249	38
State v. McCormack	8 Or. 236	570, 577
State v. McDonald	8 Or. 113	33, 40, 152
State v. McFarlain	41 La. Ann. 686	51
State v. Metcalf	17 Mont. 417	198
State v. Moran	15 Or. 282	583, 540
State v. Morey	25 Or. 241	127
State v. Napton	10 Mont. 360	14
State v. O'Brien	18 R. I. 105	541
State v. Pike	51 N. H. 105	98
State v. Piper	50 Neb. 25	220
State v. Pomeroy	30 Or. 16	173, 184
State v. Pool	20 Or. 150	483, 485
State v. Porter	75 Mo. 171	123
State v. Porter	32 Or. 135	127
State v. Rlsley	72 Mo. 609	159
State v. Roberts	15 Or. 187	152
State v. Ross	4 Lea, 442	575
State v. Ruthven	58 Iowa, 121	84
State v. Sargent	32 Or. 110	509
State v. Saunders	14 Or. 300	110, 121, 122, 123
State v. Shaffer	23 Or. 557	560
State v. Sheppard	15 Or. 588	165, 168, 170, 171
State v. Steeves	29 Or. 85	96, 110, 115, 533, 540

TABLE OF CASES CITED.

		PAGE
State v. Steeves	29 Or. 108	287
State v. Tom Louey	11 Or. 326	510
State v. Webb	55 Pac. 835	541
State v. Westfall	49 Iowa, 328	98
State v. Wheeler	62 Vt. 439	575
State v. Wilson	6 Or. 428	152
State v. Wood	18 Minn. 121	95
State Board of Agr. v. Cit. St. Ry. CO	47 Ind. 407	322
State Ins. Co. v. Porter	3 Grant Cas. 123	100
Stephen v. State	11 Ga. 225	509
Stewart v. State	19 Ohio, 302	183, 184
Stewart v. Terre Haute & I. R. R. Co.	103 Ind. 44	466
Stoddard v. Smith	5 Binney, 355	568
Stone v. Waggoner	8 Ark. 204	21
Strady v. State	5 Colo. 300	98
Sucksdorf v. Bingham	13 Or. 369	1, 4
Sugar Pine Lumber Co. v. Garrett	28 Or. 108	478
Sullivan v. Boston & Alt. R. R. Co.	156 Mass. 378	479
Summers v. Bromley	28 Mich. 125	300
Surles v. Sweeney	11 Or. 21	292, 294
Sutro v. Pettit	74 Cal. 332	353
Sturr v. Beck	133 U. S. 541	518, 523
Swanson v. Leavens	26 Or. 561	422, 424

T

Tatum v. Massie	29 Or. 140	394
Taylor v. Merchant's Insurance Co.	50 U. S. 390	109
Taylor v. Riggs	26 U. S. 591	21
Taylor v. Lewis	19 Am. Dec. 135	412
Taylor v. Miles	19 Or. 550	486, 504
Teat v. State	53 Miss. 439	570
Tedens v. Schumers	14 Ill. App. 608	49
Territory v. Jagers	9 Mont. 5	126
Territory v. Hanna	5 Mont. 248	118
Territory v. Hart	7 Mont. 489	126
Territory v. Latshaw	1 Or. 146	150, 163
Territory v. Willard	8 Mont. 328	575
The City of Norwalk	55 Fed. 98	464
The Oregon	73 Fed. 846	468
Thomson's Lessee v. White	1 Dall. 434	498
Thompson v. State	18 Ind. 386	63
Tiedt v. Carstensen	61 Iowa 334	207
Tillamook Dairy Assn. v. Shermerhorn	31 Or. 308	91
Torrey v. Inhabitants of Millbury	21 Pick. 64	145
Town of Cavendish v. Town of Troy	41 Vt. 99	182
Town of Camden v. Bloch	65 Ala. 236	139
Town of Durango v. Pennington	8 Col. 257	323
Tp. of E. Brunswick v. City of N. Brunswick	57 N. J. L. 145	139
Towns v. Klamath County	33 Or. 225	260, 261, 262
Towner v. Tickner	112 Ill. 217	568
Trask v. Trask	90 Iowa 318	442
Trowbridge v. Forepaugh	14 Minn. 133	92
Trutch v. Bunnell	11 Or. 58	359
Tucker v. Constable	16 Or. 407	125

U

Underhill v. Van Cortlandt	2 Johns. Ch. *339	76
Underwood v. Waldron	33 Mich. 232	182
United States v. Gale	109 U. S. 65	506
U. S. v. Flournoy Livestock Co.	687 Fed. 886	259
United States v. Hodson	77 U. S. 409	319
United States v. Linn	40 U. S. 290	317
United States v. Schurz	102 U. S. 378	258
United States v. Tingey	30 U. S. 115	317

TABLE OF CASES CITED.

xxi

V

		PAGE
Vall v. Drexel	9 Ill. App. 439	213, 214
Van Bibber v. Plunkett	26 Or. 562	173, 188
Van Loan v. Farmer's Insurance Co.	60 N. Y. 280	106
Van Courtland v. Underhill	17 Johns. 405	77
Van Bibber v. Plunkett	26 Or. 562	375, 376
Vansickle v. Haines	7 Nev. 249	519, 520
Van Hook v. Whitlock	26 Wend. 43 (87 Am. Dec. 246)	319
Van Voorhies v. Taylor	24 Or. 247	443, 445, 446
Verdin v. City of St. Louis	27 S. W. 44 (Id. 131 Mo. 26)	316
Vernon v. Tucker	30 Md. 456, 462	50
Vermont Machine Co. v. Batchelder	68 Vt. 430	38

W

Wabash Railroad Co. v. Druggan	142 Ill. 248	555
Wadd v. Hazelton	137 N. Y. 215	245
Waite v. Dennison	51 Ill. 319	387
Walker v. Goldsmith	7 Or. 162	388, 390
Walker v. Kretsinger	48 Ill. 502	153
Wall v. Trumbell	16 Mich. 228	144
Wallace v. Suburban Ry. Co.	26 Or. 173, 174	375, 376
Wallowa Nat. Bank v. Riley	29 Or. 289	373, 374
Ward v. Cohen	3 S. C. 338	170
Worden v. Humeston R. R. Co.	72 Iowa, 20	466
Warrington v. Pierce	22 Or. 606	344
Washer v. White	16 Ind. 136	153
Weaver v. Poyer	79 Ill. 417	413
Webb v. State	29 Ohio St. 351	49
Weiner v. Lee Shing	12 Or. 276	208
Wells v. Sanger	2 Mo. 354	153
Wheeler v. Reynolds	66 N. Y. 227	493
White v. Territory	1 Wash. St. 279	126
Whitford v. Panama R. R. Co.	23 N. Y. 465	465
Whittemore v. Fisher	132 Ill. 243	337
Wilcox v. Matteson	53 Wis. 23	246
Wilcox v. State	6 Lea, 57	577
Willamette Falls Canal Co. v. Gordon	6 Or. 179	221, 225
Williams v. Jones	12 Ind. 561	21
Williams v. State	55 Ga. 395	62
Williamson v. Chaplin	Clarke, Ch. 9	170
Williford v. State	36 Tex. Cr. R. 414	199
Wilson v. Allen	3 How. Prac. 369	169
Wilson v. Murphy	45 Mo. 409	337
Wilson v. Myrick	26 Ill. 34	304
Wilson v. State	24 Conn. 57	575
Wise v. Hilton	4 Me. 435	337
Wolf v. Smith	6 Or. 73	418
Wood Paper Co. v. Heft	75 U. S. 333	13
Woods v. Courtney	16 Or. 121	193
Woodruff v. Douglas County	17 Or. 314	225, 229
Woodward v. Or. Ry. & Nav. Co.	18 Or. 289	282, 286
Wright v. Chicago, etc., R. R. Co.	19 Neb. 175	555
Wyland v. Frost	75 Iowa, 209	414
Wyman v. Darr	3 Greenl. 183	259

Y

Yahn v. City of Ottumwa	22 Am. Lan. Reg. (N. S.) 644	182
Young v. Commonwealth	4 Grat. 550	153
Young v. Young	30 N. Y. 422	245

Z

Zimmerman v. Canfield	42 Ohio St. 463	233
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CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON

Decided April 11, 1898; rehearing denied.

HUTCROFT v. HERREN.

[52 Pac. 602]

1. **PLEADING—CONTRACT OR TORT.**—A complaint averring the delivery of merchandise by plaintiff to defendant, under an agreement that defendant should sell the same, and account for the proceeds, less expenses and a certain commission, but that defendant "wrongfully and unlawfully retained and converted to their own use" an excess over the agreed commission, declares upon a contract rather than a tort: *Suksdorf v. Bigham*, 18 Or. 360, cited.
2. **APPEAL.**—Questions of fact decided in the trial court cannot be reviewed in the supreme court.

From Marion : GEO. H. BURNETT, Judge.

Action by Jos. W. Hutchcroft against Ed. C. Herren and F. Levy, partners. Judgment for plaintiff, from which defendants appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Wm. H. Holmes*.

For respondent there was a brief and an oral argument by *Messrs. O. H. Irvine and O. P. Coshow*.

MR. JUSTICE WOLVERTON delivered the opinion.

Nine causes of action are stated in the complaint, all of which are upon assigned demands, except the first. The averments of the second,—which is illustrative of each,—omitting such as are formal merely, are in purport: That about September 18, 1894, defendants and one Arthur Crane entered into a contract in writing, which, after setting forth a promissory note given by Crane to Herren & Levy, is substantially as follows: “I hereby acknowledge that the above sum of money (\$367.16) is advanced to me by Herren & Levy solely upon my representations, agreement and promise to consign to them my crop of hops, growth of 1894, about 9,200 pounds, all growing or grown on farm situate about ——— miles from North Yamhill, in Yamhill County, Oregon; said hops to be sold for my account; net proceeds, or so much thereof as is necessary, to be applied to the payment of the above note with accrued interest, and three-fourths ($\frac{3}{4}$) cents per pound commission; the remainder, if any, to be refunded to me. It is further agreed and stipulated that I am to cure, bale, insure hops for amount of above note, at least, in name of Herren & Levy, and to deliver said hops to the said Herren & Levy in good merchantable order. Said hops to be delivered at North Yamhill on or before the twenty-fifth day of September, 1894, f. o. b. cars. Dated at Salem, Oregon, this eighteenth day of September, 1894. [Signed] Arthur Crane.” On or about September 25, 1894, in pursuance of said agreement, Crane delivered to defendants 9,152 pounds of hops, which they received and sold in accordance with the terms of said contract and fully accounted for the proceeds thereof, except that they “wrongfully and unlawfully retained, held and converted to their own use as compensation for selling and handling said hops a com-

mission of one and three-fourths cents per pound, amounting to \$160, in place of three-fourths of a cent. per pound, as provided therein; that the excess of commission so retained more than three-fourths cent provided by said contract amounted to \$91.52, which said sum was heretofore duly demanded of defendants, and defendants refused to pay the same, or any part thereof." Then follows an allegation of the assignment of the demand to plaintiff and a prayer for an ordinary money judgment.

1. It is claimed that the complaint states a cause of action arising *ex delicto* for conversion, but that the sole tendency of the evidence adduced, if effective for any purpose, was to establish a cause arising out of contract, and for breach thereof; and hence that there was a complete failure of proof to sustain the action. It is argued that the use of the phrase, "retained, held, and converted to their own use," in the complaint, distinguishes the action as one for conversion; but in this we cannot concur. It is true that the word "converted" has acquired a technical meaning, but it does not seem to us that it was here used in that sense when read in connection with the other allegations of the complaint. The parties were particularly concerned about the commission to which the defendants were entitled under the contract for effecting a sale of the hops, the defendants claiming one and three-fourths cents per pound, while the plaintiff denied that they were entitled to more than three-fourths of a cent per pound for their services. It was solely with reference to this dispute that the specific allegation alluded to was inserted in the complaint, and it was evidently framed with a view of confining the controversy directly to the one matter. So it was averred—inartistically, it may be—that the defendants retained, held, and converted to their own use one and three-fourths of a cent

per pound on the hops sold as their compensation, instead of three-fourths of one cent per pound, as provided by the terms of the contract. The defendants were admittedly entitled to three-fourths of one cent per pound ; so it is evident that there could have been no intention of charging them with a technical conversion of that proportion of the amount retained in the accounting ; neither did the pleader intend to charge the defendants in a technical sense with a conversion of the additional cent per pound. There are no other averments which tend to characterize the action as one sounding in tort, and the gist of the complaint is to fix the contractual relations of the parties, and to establish a breach, and a recovery is sought by reason thereof. See *Suksdorff v. Bigham*, 13 Or. 369, (12 Pac. 818). The action was properly construed as one upon contract, and in this view the proof was admittedly in its support.

2. A question was presented in the court below whether the contract was made with reference to a certain custom alleged to have obtained in the market touching the sale of hops as a commodity upon commission, and it was contended that the contract should have been construed with reference to such alleged custom. The same question was argued here, but whether or not such a custom existed was considered upon the proofs offered concerning it, and decided against the appellants, which determined the construction of the contract. We are precluded, therefore, by reason of the matters of fact involved, from entertaining the question here. Another contention was that Miller Bros. were not the agents of defendants, or that their authority was so limited as not to empower them to enter into a certain stipulation pertinent to the issues in the name of the defendants ; but this was also a question of fact submitted to the trial court,

and precludes further inquiry here. These considerations affirm the judgment of the court below, and it is so ordered.

AFFIRMED.

Argued March 23; decided April 11, 1898.

MILLER v. MEDICAL BOARD.

[52 Pac. 768]

COURTS—PHYSICIANS—The proceedings of a board of medical examiners in refusing a license to practice to one applying therefor cannot, after such board has become *functus officio*, be revised by the courts where no proceeding was taken at the time to compel the board by mandamus to act.

From Multnomah : E. D. SHATTUCK, Judge.

Fred D. Miller applied to the state board of medical examiners for a license to practice medicine, but was refused because the application was not made within ninety days after the passage of the act of 1895. An appeal was taken to the circuit court, and thence here.

AFFIRMED.

For appellant there was an oral argument by *Mr. John W. Gwilt*, with a brief, urging, among others, this point :

During those ninety days, Dr. Miller walked among his brother physicians—with them he alleviated the sufferings of mankind—with them he consulted and they with him; and now on the ninety-first day, because he perhaps was absent from the state for the preceding ninety days—or perhaps he lay upon a sick bed for ninety days—or perhaps his business took him out among the mountains, where the doings of our legislature are little known—it is brought to his attention that the sixteenth regular session of the Oregon legislature has passed a

law by which the results of his efforts of the preceding dozen years are torn from him. The result is that his clientage, built up by going day or night in storm or shine to the bedside of his patients, as all physicians must do, is taken away, and he walks the streets like Othello, his occupation gone ; and should he make one attempt to use his knowledge, or the wisdom that comes from ripe experience of years, that moment he becomes a criminal and subject to prosecution, as if he had been a petty thief.

For respondents there was an oral argument by *Mr. Cicero M. Idleman*, attorney-general, with a brief over the names of *Mr. Idleman* and *Mr. Charles F. Lord*, district attorney, presenting, among others, this point :

As an excuse for his failure to present his certificate within the required time, the fervid imagination of counsel for the appellant has led him to present a very pathetic account of the tribulations of his client, depicting him as a new Santa Filomena, now soothing the throbbing brow of pain in the dreary ward of the hospital, and anon immersed in the profound wildernesses that abound in Oregon, far from all the cheerful adjuncts of civilization, whither he had gone to rescue some poor victim of disease. This may all be truthful or it may not ; we confess we don't know, and as counsel has so much better opportunities than we for acquiring information upon this interesting subject, we will allow him the benefit of the doubt. Dr. Miller certainly ought to know about that, though we have examined the appellant's abstract of record in this case without finding any plea of that character, but the appellant may have forgotten about it in the excitement of the trial. If he intended to rely upon such circumstances to prove his right to a license,

he should have made this plea before the board of medical examiners and not raised the point for the first time in the supreme court.

MR. JUSTICE WOLVERTON delivered the opinion.

This is an appeal by Fred D. Miller from the action of the board of medical examiners for the State of Oregon in refusing to recognize him as a licensed physician, under the provisions of "An act to regulate the practice of medicine and surgery," etc., approved February 23, 1895, and in excluding his name from the register of licensed physicians and surgeons. For several years prior to 1889 the appellant had been engaged in the practice of medicine and surgery in East Portland, Multnomah County, and, being entitled to the privilege, had his name registered as such in the county clerk's office, in accordance with the provisions of section 13 of "An act to regulate the practice of medicine and surgery within the State of Oregon," approved February 28, 1889. After the passage of an act approved February 21, 1891, amendatory of the act last referred to, but not within ninety days thereafter, the appellant presented to the board a certificate from the county clerk of his registry, accompanied with the requisite fee of \$1, and requested that a license be issued to him in accordance with section 3 of said amendatory act; but the request was denied, upon the ground that he had not made the application within the time prescribed by said section 3. Subsequently, in August, 1891, the appellant again applied and presented to said board of examiners a diploma issued by the Hahnemann Medical College, of Chicago, Illinois, accompanied by his affidavit that he was the lawful possessor of the same, and that he was the person therein named; but, the said college not being deemed

an institution in good standing, this application was also denied. Nothing further was done in regard to the matter until the second day of July, 1895, when the appellant applied to the present board for recognition as a licensed physician under the act of 1895. He bases his right to the relief prayed for upon two grounds: First, that he was entitled to a license from the old board upon his application therefor and certificate of registry from the county clerk of Multnomah County, although his application was not made within ninety days after the passage of the act of 1891, and, it having been then wrongfully denied him, that he should now be accorded the privilege of registry; and, second, that he was entitled to have had a license issued to him upon his second application, based upon his showing and diploma from the Hahnemann Medical College, and that, being so entitled and the same having been wrongfully withheld, the present board should now grant the relief.

It may be remarked in passing that this court has no authority to review or revise the proceedings of the old board of medical examiners. There was no appeal under the law from its action, nor was there any attempt made at the time or since to have its proceedings reviewed in any respect as it concerns the appellant. If the board had been derelict in a duty which it owed to the plaintiff, it could have been required by mandamus to act; but the remedy was not resorted to, and the board itself has become *functus officio*, so that there remains no way of subjecting its action to review. By section 3 of the act of 1889 (Laws 1889, p. 144), the board was authorized to issue two forms of certificate,—one for persons in possession of diplomas or licenses from legally chartered medical institutions in good standing, and the other for candidates examined by the board. By section 13, the provisions of the act were not to apply to persons then prac-

ting medicine or surgery within the state, but they were required to cause their names and places of residence to be registered in the office of the county clerk of the county in which they resided, in a registry book therein described, within sixty days after the approval of the act. Section 3, as amended by the act of 1891 (Laws 1891, pp. 153, 154), provided for the issuance by the board of three forms of certificates, the first two being the same as in the original act, and the third for those who were, at the date of the passage of the act, practicing medicine or surgery within the state, and had registered their names and places of residence in conformity with said section 13. Section 4, as amended, required every such person who had taken advantage of said section 13 to present, within ninety days after the passage of the amendatory act, to the secretary of the board, a certificate of such register from the county clerk, accompanied with a fee of \$1, whereupon the board was required to issue its certificate authorizing him to practice his profession. The act of 1895 (Laws 1895, pp. 61-63) provides for the appointment by the governor of a new and distinct board of examiners, who are empowered to grant licenses only upon examination of the applicant; but it is provided by the last clause of section 3 "that all persons who have been regularly licensed under heretofore existing laws of the state, and have complied with the provisions thereof, shall be taken and considered as licensed physicians under this act, and the secretary of the board herein provided shall enter the names of such persons upon the register kept by him as licensed physicians and surgeons, upon written application of such person, accompanied with such license heretofore regularly issued.

It may be conceded, for the purpose of this case, that if the appellant had presented his certificate of registry, accompanied with the requisite fee of \$1 to the exam-

ining board within ninety days after the passage of the act of 1891, with an application for the issuance of a certificate to practice, and the application had been arbitrarily denied, a presentation of such facts to the present board would have been equivalent to an application accompanied with a license regularly issued which would entitle him to registry. But the case presented does not come within the terms of the proposition thus conceded. The application was made after the ninety days had expired, and it is sought to bring it within the meaning of the proposition by a contention that the ninety-days' limit designated is directory only, and that the applicant was entitled to his license if he presented his certificate of registry at any time, even after the designated limit. The right to practice medicine is a privilege which the legislature has constitutional authority to grant upon certain reasonably prescribed conditions. Before a person is entitled to the privilege or can be said to have obtained it, he must comply with the statutory provisions or requirements; and, if the privilege once existed, he may lose it by noncompliance with new requirements. The requirements are conditions to the privilege. Now, the board, under the act of 1891, was empowered to issue a license of the third form upon the applicant's compliance with the condition of the statute that he present the certificate within ninety days. If he did not comply, he was surely not entitled to such certificate as of right. In other words, he was not entitled to exercise the privilege which he sought to have granted him by certificate from the board. Mr. Sutherland says: "The consequential distinction between directory and mandatory statutes is that the violation of the former is attended with no consequences, while a failure to comply with the requirements of the other is productive of serious results." *Suth. St. Const.*, § 446. The plaintiff's right to the priv-

ilege sought depended upon his compliance with the law, and the time designated was a material element in the condition. By reason of his noncompliance, the board acted within its prescribed powers in denying him the privilege by refusing him a license: *Battles v. Board*, 16 R. I. 372 (17 Atl. 131). And the present board acted within its prescribed powers in refusing the applicant registry as a licensed physician.

As it respects the second contention, it is only necessary to add that the board of 1891 passed upon the question; and, whether it decided rightly or wrongly, the present board has no power to correct its judgment. Furthermore, it is not authorized to grant a license upon diplomas from medical colleges alone, without an examination of the applicant; so it is plain that it has committed no error in refusing the applicant the right of registry. The judgment of the court below will be affirmed.

AFFIRMED.

Decided April 11, 1898.

JACKSONVILLE SCHOOL DISTRICT v. CROWELL.

[52 Pac. 603]

33	11
133	234
33	11
37	543

MANDAMUS—APPEAL—An appeal from a peremptory writ of mandamus requiring county commissioners to levy an additional tax will be dismissed, where it was not taken until after the commissioners had complied with the terms of the writ.

From Jackson: H. K. HANNA, Judge.

The county court, having complied with a peremptory writ of mandamus, appeals. Respondent moves to dismiss.

DISMISSED.

Mr. A. Evan Reams, for the motion.

Mr. Chandler B. Watson, contra.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This proceeding was instituted by plaintiff against the defendants, W. S. Crowell, county judge, and Martin Perry and W. H. Bradshaw, county commissioners, of Jackson County, to compel them, as the county court of said county, to perform an alleged duty enjoined upon them by law, towit: to levy an additional tax upon each dollar of the taxable property of said county for school purposes; and at the trial thereof the court awarded a peremptory writ of mandamus, as prayed for in the petition. The county court obeyed the command, in pursuance of which it levied an additional tax of one and two-tenths mills, which was duly extended upon the tax roll of said county, and a warrant attached thereto commanding the sheriff to collect the same. Thereafter defendants perfected an appeal, which plaintiff's counsel move to dismiss, contending that the compliance with the terms of the peremptory writ waived the right of appeal; while defendants' counsel insist that the statute under which the writ was allowed is violative of the constitution, and, such being the case, the legislative act should receive judicial construction, notwithstanding the mandate has been obeyed. But it is urged in plaintiff's behalf that, the tax having been levied, and the greater portion thereof collected, in pursuance of the peremptory writ, a reversal of the judgment would not place the taxpayers whose property was affected thereby in *statu quo*, and that the ministerial duty of levying the tax, which the law enjoins, having been fully performed, the county court is powerless to review its action, and hence a judgment of reversal would have nothing upon which it could operate.

The power of a superior court to compel an inferior court, corporation, board, officer or person to perform an act which the law specially enjoins, as a duty resulting from a trust or station, continues until such act is accomplished, upon the performance of which the court must necessarily lose jurisdiction of the person and subject-matter; for it must be admitted that it would be a vain thing, indeed, to adjudge that an inferior tribunal was under no obligation to perform an act after it had been fully accomplished. The rule is general that an appellate court cannot, without express statutory authority, assume jurisdiction of or express opinions which will be of any binding force upon a disputed question of law, unless it is involved in a substantial controversy existing between adverse parties and brought before such court for review in the manner prescribed by law: 2 Enc. Pl. & Prac. 341; Elliott, App. Proc. § 520; *Lord v. Veazie*, 49 U. S. (8 How.) 251; *Wood Paper Co. v. Heft*, 75 U. S. (8 Wall.) 333; *Little v. Bowers*, 134 U. S. 547 (10 Sup. Ct. 620); *Singer Manufacturing Co. v. Wright*, 141 U. S. 696 (12 Sup. Ct. 103); *California v. San Pablo R. Co.*, 149 U. S. 308 (13 Sup. Ct. 876); *Mills v. Green*, 159 U. S. 651 (16 Sup. Ct. 132).

In *Cutcomp v. Utt*, 60 Iowa, 156 (14 N. W. 214), the trial court having refused to grant a writ of mandamus to compel defendant, as mayor of a city, to issue to plaintiff a license to sell wine and beer for the period of one year from April 13, 1881, under an ordinance which provided that an annual license might be issued to the keepers of wine and beer saloons for the sum of \$20, plaintiff appealed from the judgment; and it appearing that, after the license was applied for, the ordinance in question had been amended so as to require the payment of \$1,000 for such license, the appellate court refused to remand the cause for the purpose of determining what plaintiff's

rights were under the original ordinance. In *Hice v. Orr*, 16 Wash. 163 (47 Pac. 424), it was held that an appeal in a mandamus proceeding to compel a mayor to appoint a city attorney should be dismissed where, pending such appeal, the mayor appoints a city attorney, and the appointment is confirmed by the city council, since such appointment settles the controversy to be determined. In *People v. Common Council of Troy*, 82 N. Y. 575, which was a mandamus proceeding to compel the common council to appoint police commissioners under an act of the legislative assembly, the writ was denied; and, pending an appeal from such judgment, it appeared that the terms of office of the commissioners to be appointed had expired. It was held that the appeal should be dismissed. In *Re Manning*, 139 N. Y. 446 (34 N. E. 931), a peremptory writ of mandamus having been issued, commanding the mayor of Albany to cause to be published the lists of inspectors and clerks of an election, an appeal therefrom was taken, pending which the election was held, and the powers of such inspectors and clerks were exhausted and their terms of office expired, in view of which it was held that the appeal should be dismissed.

In *State v. Napton*, 10 Mont. 369 (25 Pac. 1045), a peremptory writ of mandamus was issued commanding the defendant, as clerk of the district court, to issue to the relator a certificate evidencing his mileage and attendance as a trial juror, from which judgment the defendant appealed, pending which he obeyed the order of the court, whereupon the appeal was dismissed. DE WITT, J., in rendering the decision, says: "A judgment of any kind from this court would present a peculiar result. An affirmance would be to direct the district court to issue a writ, which that court has already issued, and which has been obeyed. A reversal would be to say to the lower court: 'You may not order the clerk to do that which he

has already fully performed.' It is apparent that there is no controversy before us." In *San Diego School District v. Board of Supervisors*, 97 Cal. 438 (32 Pac. 517), the board of supervisors having refused to levy a tax sufficient to raise the amount of money estimated to be needed for school purposes, a peremptory writ of mandamus was issued, commanding it to make the required levy; and, upon the service of the writ, the mandate was complied with, and the tax levied as demanded by the court. Thereupon an appeal was perfected, in dismissing which HARRISON, J., says: "The defendant voluntarily complied with the mandate of the court, and the judgment was thereupon satisfied, and its force exhausted. After it had thus been satisfied, there was nothing in the judgment which the court had rendered of which the defendant could complain, or about which it could say that it was aggrieved. A reversal of the judgment would not of itself set aside the levy of the tax which had been made, nor did the appellant, by its compliance with the judgment, lose any property or rights of which restitution could be made in case of a reversal." It follows from the rule announced in these cases that the appeal must be dismissed, and it is so ordered.

DISMISSED.

Decided April 11, rehearing denied June 20, 1898.

PRICE v. WOLFER.

[52 Pac. 759]

RULE FOR ADMITTING SECONDARY EVIDENCE—Secondary evidence of a transfer of personal property by bill of sale is inadmissible unless a reasonable excuse is given for not producing the writing.

From Marion: GEORGE H. BURNETT, Judge.

Action of replevin by I. J. Price against George J. Wolfer, wherein plaintiff failed and now comes here for redress.

AFFIRMED.

For appellant there was a brief over the name of *Holmes & Kellogg*, with an oral argument by *Mr. Wm. H. Holmes*.

For respondent there was a brief and an oral argument by *Messrs. Grant B. Dimick and John A. Carson*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This action was commenced in the justice's court of Salem district, Marion County, to recover thirty cases, each containing twenty-four soda water bottles, or for the sum of \$75, as the reasonable value thereof in case delivery could not be had, and for the sum of \$100 as damages for their unlawful detention. Plaintiff alleges that about November 2, 1893, he purchased and now is the owner of what is known as the "Salem Soda Works" and the "Capital City Bottling Works," together with all the bottles and cases belonging thereto, wherever the same might be found; that between January 1, 1892, and January 1, 1895, defendant, in said county, wrongfully and unlawfully took possession of said thirty cases of bottles when the property of plaintiff; that about June 18, 1895, he demanded of the defendant the delivery thereof, but he refused to comply therewith. The defendant, after denying the material allegations of the complaint, alleges that between April 2 and July 4, 1892, one P. Anderson, being the owner of said soda and bottling works, together with the bottles and cases belonging thereto, sold and delivered to one Samuel Miller twenty-four cases, each containing twenty-four soda water bottles and six empty cases; and that Miller, about May

27, 1895, sold and delivered the same to defendant who now is the owner thereof. The reply having put in issue the allegations of new matter contained in the answer, a trial was had, resulting in a dismissal of the action, and a judgment against plaintiff for costs and disbursements, from which he appealed to the circuit court, and, the trial therein resulting in a similar judgment, he appeals to this court.

It is contended by plaintiff's counsel that the court erred in striking out testimony which had been admitted without objection, and in granting a motion for a judgment of nonsuit. The testimony admitted at the trial tends to show that on April 25, 1892, P. Anderson was the owner of the Capital City Bottling Works and the Salem Soda Works, which on that day he sold to one G. W. Epler, who on June 6, 1892, sold and delivered the same to George Collins and Lewis Folsom; that in March, 1893, Collins sold and delivered to one William Baxter his undivided one-half interest in said works, and thereafter Folsom sold and delivered to the same person his interest therein, each executing to the purchaser a bill of sale evidencing the transfer; and that on October 28, 1893, Baxter sold and delivered to plaintiff the said soda and bottling works, and executed to him a bill of sale therefor. George Collins, being called as a witness for plaintiff, testified concerning the sale and delivery by him and Folsom, and, having stated that he executed to Baxter a bill of sale, defendant's counsel demanded of the witness the production of such instrument; but, not being able to comply therewith, the court, holding that the bill of sale was the best evidence of the transfer, struck out the testimony of the witness, to which action plaintiff excepted. Lewis Folsom testified that, having owned an interest in said soda and bottling works, he

transferred the same to Baxter by a written instrument ; whereupon the court, holding that the bill of sale afforded the best evidence, refused to permit the witness further to testify concerning the transfer of said property until proof of the loss of said instrument had been offered, to which ruling the plaintiff excepted. The plaintiff, appearing as a witness in his own behalf, testified that he purchased the Capital City Bottling Works and the Salem Soda Works from William Baxter, who, at the time of such purchase, had control thereof ; that he had never sold or transferred any of such property ; and that he did not know where the bottles and cases were when he acquired the title thereto, but understood that they were in the possession of the customers of said business, scattered over Marion and Polk counties. The plaintiff having thereupon rested his cause, the court gave a judgment of nonsuit.

In *Dunn v. Hewitt*, 2 Denio, 637, which was an action to recover from a constable a wagon which had been seized on execution as the property of plaintiffs' father, the former owner thereof, who having confessed a judgment, the wagon was sold on execution issued thereon to one Marshall, from whom plaintiffs claimed to have purchased it. The plaintiffs, to prove their title, called their father as a witness to the purchase, as a matter within his knowledge ; but, it being disclosed on his recross-examination that Marshall had executed to plaintiffs a bill of sale, the defendant moved to strike out so much of his testimony as related to that transaction, unless the writing should be produced ; but the justice before whom the cause was tried, refusing to grant the motion, gave judgment for plaintiffs, which the court of common pleas confirmed on certiorari, whereupon the defendant brought error to the supreme court, which held that where the execution of the bill of sale was first disclosed on the sec-

ond cross-examination of a witness, who had orally proved the transfer on his direct examination, the parol testimony should be stricken out. JEWETT, J., rendering the decision of the court, says: "It is well settled that whenever it turns out, either on the direct or cross-examination, that a writing exists with regard to a transaction, which the law regards as the best evidence, it must be produced, or its absence accounted for. If this is not done, all inferior evidence that may have been given will be stricken out and disregarded." In *Crary v. Campbell*, 24 Cal. 634, which was an action to recover damages alleged to have been caused by defendant cutting a ditch, whereby the waters therefrom flowed upon and injured plaintiff's mining claim, at the trial of which a witness testified that he purchased the claim from the original locator, and held the same until he conveyed it to plaintiff, who thereafter had possession of it, on cross-examination the witness stated that, when he purchased the mining claim, he obtained a bill of sale thereof, and that when he conveyed it to plaintiff, he also executed a bill of sale, evidencing the transfer. Defendant's counsel thereupon moved the court to strike out that part of the testimony of the witness which related to his purchase and conveyance, on the ground that the bill of sale was the best evidence of such transfer; but, the court denying the motion, an exception was saved, and, judgment having been rendered for plaintiff, the court, in reversing it, say: "If the facts sought to be proved by this witness were material, as they seem to have been regarded by the parties and the court, then the bills of sale, which were the best evidence of the transfers, should have been produced. The plaintiff deemed it necessary to connect himself with the right and title acquired by the original locators of his mining claim, and we apprehend it was of some importance, at least, that he should do so. But, to

do this, it was necessary for him to produce the conveyances or bills of sale, the existence of which was proved. The court ought to have ordered the parol evidence of the sales and conveyances stricken out when the application to that end was made."

In *Graham v. Hamilton*, 25 N. C. 381, the plaintiff, at the trial of an action to recover the value of a quantity of castings alleged to have been converted by the defendants to their own use, called one Clark as a witness, to prove that the castings were received by him as plaintiff's agent, to take to South Carolina to sell. The defendant objected to the introduction of this testimony, contending that a written contract had been entered into between plaintiff and the witness concerning the property, and, in support thereof, introduced in evidence a letter written by plaintiff, in which he stated: "I have a written agreement with Clark as to his property that was sold, and the castings I sent with him." The objection was overruled, and, the witness being permitted to testify with reference to the transaction, a judgment was rendered in plaintiff's favor, in reversing which the supreme court say: "It therefore appears by the plaintiff's own acknowledgment, according to the grammatical, and, as we think, obvious, meaning of the letter, that he had an agreement in writing with Clark as to the castings sent with him. The title to this property was to decide the action. The written agreement was better evidence of the title than the parol testimony of Clark, and the plaintiff, we think, should have been compelled to produce it, unless he had shown by satisfactory evidence that the written agreement did not extend thereto, or was not in existence or in his power." It has been held that where a plaintiff, to establish his title to a mule, offered oral evidence of his having bought the animal and taken a bill of sale therefor, the evidence was inadmissible until the writing

was produced : *Stone v. Waggoner*, 8 Ark. 204. The rule is universal that secondary evidence is not admissible when it appears that primary evidence is obtainable : *Morton v. White*, 16 Me. 53 ; *Gage v. Wilson*, 17 Me. 378 ; *Greeley v. Quimby*, 22 N. H. 335 ; *Newsom v. Jackson*, 26 Ga. 241 (71 Am. Dec. 206) ; *Taylor v. Riggs*, 26 U. S. (1 Pet.) 591. And, under this general rule, it has been held that the contents of a written instrument cannot be proved by parol, unless the original has been lost or destroyed, or its nonproduction in some way accounted for : *Patterson v. Doe*, 8 Blackf. 237 ; *Williams v. Jones*, 12 Ind. 561.

The rule that parol testimony of the contents of a writing is inadmissible in evidence, until the absence of the original is accounted for, is particularly applicable in the following instances : (1) In the case of records and other instruments which the policy of the law requires to be in writing ; (2) where the writing is not so required, but the parties have adopted it for greater solemnity or security ; and (3) where the contents of a document are in issue : 1 Best, Ev. (Morgan's Ed.) § 223. In the case at bar it will be observed that it is alleged in the complaint that defendant unlawfully took possession of the cases and bottles between January 1, 1892, and January 1, 1895, while plaintiff did not obtain a title thereto until November 2, 1893. It is manifest, therefore, that the conversion complained of may have occurred before plaintiff obtained a title to the property in question ; and, as his right of action was dependent upon the title of Anderson, Epler, Collins & Folsom, and Baxter, it was incumbent upon him to prove such title ; and, it appearing from the testimony that the transfer in each instance was evidenced by a bill of sale, the duty was cast upon him to introduce the same in evidence, or to show a reasonable excuse for not so doing, before he could

offer parol testimony of the contents thereof. The court committed no error in striking out the testimony or in granting the judgment of nonsuit, which is affirmed.

AFFIRMED.

Decided April 18, 1898; rehearing denied.

WHEELER v. McFERRON.

[52 Pac. 908]

PERSONAL PROPERTY — BUILDING.—It is error to nonsuit plaintiff in an action for conversion of a building upon the ground that his evidence shows the building to be real and not personal property, where the defendant claims the building by virtue of a levy upon it as personal property under attachment, and the evidence merely shows that it was erected by one person upon land of another under an agreement giving the former the right to remove it.

From Linn: GEO. H. BURNETT, Judge.

Action by A. Wheeler, as a general assignee, against J. A. McFerron, wherein he was defeated but appealed.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. H. C. Watson*.

For respondent there was an oral argument by *Mr. James K. Weatherford*, with a brief over the names of *Weatherford & Wyatt*.

MR. JUSTICE BEAN delivered the opinion.

This is an action to recover damages for the alleged wrongful conversion by the defendant of a certain building. The complaint, after averring that the Blaker-Graham Company was and now is a corporation doing business in Portland, alleges that on or about the eleventh day of September, 1895, it was the owner and in posses-

sion of a certain building in the town of Shedd's, Linn County, of the value of \$700, used as a warehouse for the storage of hay, and known as "Blaker-Graham Company's Warehouse," and that the defendant wrongfully and unlawfully seized and took possession thereof, and converted the same to his own use, and has ever since wholly deprived the Blaker-Graham Company and this plaintiff of the use and possession thereof; that on September 26, 1895, the Blaker-Graham Company, being insolvent, made an assignment of all its property for the benefit of its creditors to the plaintiff, who, on the eighth of October following, demanded of the defendant, but was refused, possession of the warehouse in question. The answer denies, in substance, all the material allegations of the complaint; and, for a separate defense and by way of justification, avers that the defendant was at all the times mentioned the sheriff of Linn County, and that the warehouse in question was the property of one A. Blaker; that by virtue of a writ of attachment, issued out of the Circuit Court of Multnomah County, in an action brought by A. C. Olin against Blaker, the defendant, as such sheriff, attached the said warehouse "as the personal property" of Blaker, since which time "he has held and now holds" the same "under and by virtue of the said writ of attachment so issued as aforesaid, and not otherwise." The reply put in issue the material allegations of the answer. At the trial the plaintiff was nonsuited, on the ground that his evidence showed the building in question to be real and not personal property, and, therefore, the action could not be maintained for its conversion, and this ruling presents the only question on this appeal.

That a building may be personal property, for which an action of replevin or trover will lie, is undisputed, and both the complaint and answer in this case were evi-

dently framed on the theory that the building in question is of that character. The complaint is in the form usual in such actions, and the defendant justifies his seizure and possession by virtue of a writ of attachment levied as in cases of personal property. Unless, therefore, the evidence shows the parties to have been mistaken in this regard, the court is bound to sustain the action. The only evidence bearing on this question is the testimony of Blaker, who says that: "I am the president of the Blaker-Graham Company. The warehouse belonged to me before the formation of the corporation. After the corporation was formed, we transferred this house to it in 1893. The corporation was in possession of the warehouse from that time until the time that it was attached. The warehouse was built by me, and adjoined an old building which was built before I got possession of it by Davis Brothers. This was erected in 1883, upon land that belonged to the Southern Pacific Company by their permission for the purpose of using it as a warehouse. Davis Brothers had a lease from the railroad company, and I purchased their right under the lease, but this lease had expired long before the attachment. The lease was not transferred to me, because it was not transferable. About the time I bought out Davis Brothers I had a conversation with Mr. Koehler, the manager of the Southern Pacific Company's lines in Oregon, and he told me to go on and use the ground as Davis Brothers had done under their lease, and when I got ready he would give me a lease. I had full control of the warehouse up to the time I transferred it to the Blaker-Graham Company, and the right to use the ground around it, but it was the same right as other persons had to use the ground on the outside. There was no objection to the use of the ground by other persons and the general public, so far as I know. I had the right to move the house. I knew that Davis

Brothers had a lease of the ground on which the old house was situated from the railroad company."

In our opinion, this evidence is not so inconsistent with or contradictory of the theory upon which the pleadings were framed as to justify the court in taking the case from the jury. There is no showing as to the size of the building, its means of annexation to the freehold, or the terms of the agreement under which it was constructed on the property of the railroad company, except that the witness says he had a right to move it. The case made is simply one in which a building was erected by one party upon land belonging to another under some kind of an agreement by the terms of which he has a right to remove it, and this showing will not sustain a ruling, under the pleadings in the case, that it is real property: *Curtiss v. Hoyt*, 19 Conn. 154 (48 Am. Dec. 149); *Ashmun v. Williams*, 8 Pick. 402; *Rogers v. Woodbury*, 15 Pick. 156. Prima facie, all buildings belong to the owner of the land upon which they are erected, as part of the realty; but it is perfectly competent for him to agree with the owner of such buildings that they shall remain personal property, and it is said this agreement will be implied "where the erections are made by one having no estate in the land, and hence no interest in enhancing its value, by the permission or license of the owner, * * * and in the absence of any other facts or circumstances tending to show a different intention:" *Michigan National Bank v. Stanton*, 55 Minn. 211 (43 Am. St. Rep. 491, 56 N. W. 82). Whether the building in question is in fact real or personal property we do not undertake to determine, because there are not sufficient facts in the record to enable us to do so; but we simply hold that it was error for the trial court to so rule upon the facts before it, in view of the theory upon which the parties to the action had theretofore proceeded, and the

further fact that such ruling was in effect a denial to either party of any interest in the property. It will be observed that the answer not only alleges that this building was attached as the personal property of Blaker, but that it belonged to him, while the evidence shows that the land upon which it was situated belongs to another. This allegation throws much light upon the inferences to be drawn from the meager testimony in reference to the matter. The contest in this case is not between the owner of the land and a claimant of a building, but between two persons who have heretofore treated the subject-matter of the controversy as personal property, and neither of whom have any interest therein, so far as the record discloses, unless it is such property. It follows from these views that the judgment of the court below must be reversed, and the cause remanded for a new trial.

REVERSED.

Argued March 30; decided April 18, 1898.

GOBBI v. REFRANO.

[52 Pac. 761]

1. **APPEAL FROM JUSTICE'S COURT—NEW UNDERTAKING**—Where an appellant filed with the justice of the peace in due time his undertaking on appeal sufficient in form, but by a mistake of the attorney one of the sureties did not appear and justify after being excepted to, and an application is made to the circuit court for leave to file a new undertaking, it should be granted and the case held for trial, under Hill's Ann. laws, § 2129: *Hosford v. Logus*, 18 Or. 130, and *Hughes v. Clemens*, 28 Or. 440, cited.
2. **QUASHING EXECUTION SALE**—An execution issued on a transcript from a justice's court will be quashed, and a sale thereunder set aside, where the judgment recovered on an appeal was paid before the sheriff's deed had issued, for the judgment of the lower court had become merged into the one rendered by the circuit court, which was already paid.

From Multnomah: ALFRED F. SEARS, Judge.

Action by Barney Gobbi against M. Refrano for \$213, wherein plaintiff had judgment in the justice's court for

\$170. On appeal plaintiff had judgment for \$54, which was paid. Plaintiff appeals from certain rulings which are fully set forth in the opinion.

AFFIRMED.

For appellant there was a brief over the names of *Davis, Gantenbein & Veasie* and *Caples & Allen*, with an oral argument by *Mr. Arthur L. Veasie*.

For respondent there was a brief and an oral argument by *Mr. Julius C. Moreland*.

MR. JUSTICE BEAN delivered the opinion.

The plaintiff recovered a judgment in a justice's court, from which the defendant appealed to the circuit court by serving and filing his notice of appeal and undertaking in due form, within the time required by law. Exceptions having been filed to the sufficiency of the surety on the undertaking, the defendant gave notice that he would produce him before the justice on a day named to justify, but failed, owing to a mistake of his counsel. He thereafter filed a transcript in the circuit court, and applied to that court on motion, supported by an affidavit, for leave to file a new undertaking on the appeal. The court, being satisfied with the showing made, allowed the application, and, a motion of the plaintiff to dismiss the appeal for want of jurisdiction having been overruled, a trial was had, and the judgment from which the appeal was taken materially reduced. Prior to the appeal, however, the plaintiff filed a transcript of the judgment in the office of the clerk of the circuit court, and, by virtue of an execution issued thereon, certain real property belonging to the defendant was seized and sold to the plaintiff after the appeal had been taken, and the sale was confirmed before the case was tried on such appeal.

After the trial in the circuit court, the defendant paid into court the amount of the judgment and costs rendered against him, and thereupon filed a motion to have the sale referred to annulled and set aside; but before the determination of this motion the plaintiff procured a sheriff's deed for the property so purchased by him. The defendant thereupon filed a supplemental petition reciting this fact, and asking, in addition to annulling the sale, that the deed be adjudged void. Upon the hearing an order was made canceling the judgment recovered in the justice's court, a transcript of which was on file in the circuit court, and vacating the sale thereunder, for the reason that such judgment had become merged in the one rendered by the circuit court, which had been fully satisfied. From these rulings of the circuit court the plaintiff appeals, claiming — First, that it never acquired jurisdiction because of the failure of the surety on the undertaking for the appeal from the justice's court to justify after exceptions to his sufficiency had been duly filed; and, second, that it had no power or authority to set aside the sale made under the execution issued on the judgment of the justice's court.

1. Both of these alleged errors are summed up in the contention that the filing, within thirty days from the entry of the judgment, of an undertaking for costs, with surety or sureties who, if expected to, justify in the manner prescribed by law, is a condition precedent to the jurisdiction of the circuit court on an appeal from a justice's court. In other words, that although a party to a judgment in a justice's court may serve and file with the justice, within the time required, his notice of appeal and undertaking in due form, with an affidavit of the sureties attached thereto showing that they possess the qualifications of bail on arrest, he loses the benefit of such appeal

if the sureties fail for any reason to justify when excepted to, and the appellate court is powerless in such a case to allow him to file a new undertaking. We cannot concur in this view. An appeal from a justice's court is taken by serving a notice on the adverse party and filing the original, with the proof of service indorsed thereon, with the justice, and by giving an undertaking for the costs of the appeal within a certain specified time (Hill's Ann. Laws, § 2119); and it has been held that the filing of an undertaking within the time specified is jurisdictional (*Odell v. Gotfrey*, 13 Or. 466, 11 Pac. 190). But there is no question in this case as to the defendant's compliance with these requirements. His notice of appeal was served and filed with the proof of service indorsed thereon, and an undertaking in due form for the costs of the appeal given within the time specified, and the only defect in the proceedings is that by an excusable mistake the surety failed to appear and justify after having been excepted to. To deny him the right to file a new undertaking under such circumstances, and turn him out of court, would neither comport with the spirit of liberality which has always characterized the rulings of the court in matters of this kind, nor conform to the provisions of section 2129 of the statute, which declares that an appeal cannot be dismissed on the motion of the respondent on account of a defective undertaking, if the appellant, before the determination of the motion, will execute a sufficient undertaking, and file the same in the appellate court, upon such terms as may be just, and would be contrary to the theory upon which the judgment in *Hughes v. Clemens*, 28 Or. 440, (42 Pac. 617) proceeds, and inconsistent with the ruling in *Hosford v. Logus*, 13 Or. 130, (11 Pac. 900).

2. This disposes of the other question in the case. The circuit court having acquired jurisdiction, the judgment of the justice's court necessarily merged in that rendered by it, and the satisfaction of the latter operated as a satisfaction of the former. And as the execution under which the sale was made issued out of the circuit court, and the plaintiff therein was the purchaser, such court had the power to withdraw or quash such execution, and set aside the sale, on motion made, before it ripened into a title: *Day v. Graham*, 1 Gilman, 435; *Jenkins v. Merriweather*, 109 Ill. 647; 1 Freem. Exns, § 76. Hence there was no error in ordering that the judgment be satisfied of record and the sale thereunder annulled.

AFFIRMED.

Argued April 7; decided June 20, 1898.

FELLOWS v. EVANS.

[52 Pac. 491]

1. **VENDOR AND PURCHASER.**—A grantor is not chargeable with false and fraudulent representations concerning the title to land conveyed, although he said the title was perfect, when all the facts within his knowledge were communicated to the grantee prior to the purchase, since his statement was but an expression of opinion based on such facts.
2. **FRAUD—RESCISSION OF SALE.**—In the absence of fraud, an executed sale of real estate will not be rescinded for failure of title, but the purchaser must look for protection to the covenants of the deed.
3. **ADVERSE POSSESSION.**—An adverse possession of public land, with a claim of exclusive title thereto as a homestead, for more than ten years, except as against the United States, vests a perfect title in the occupant, as against one who had obtained a patent before such occupancy: *Parker v. Metzger*, 12 Or. 407, approved.

From Douglas: J. C. FULLERTON, Judge.

Suit by R. A. Fellows against S. D. Evans, wherein defendant prevailed and plaintiff appealed.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. C. A. Sehlbrede*.

For respondent there was a brief over the names of *Wm. R. Willis* and *Andrew M. Crawford*, with an oral argument by *Mr. Willis*.

MR. JUSTICE BEAN delivered the opinion.

This is a suit to rescind an executed sale of land alleged to have been brought about by fraud, to compel a return of the purchase money, to recover \$450 for improvements placed on the land by the plaintiff, and \$500 as damages on account of such fraud. The facts are that on October 12, 1889, the plaintiff purchased of defendant two hundred and forty acres of land in Douglas County, for \$2,300, and received a deed therefor containing the usual covenants of warranty, and immediately entered into and has ever since remained in the quiet and uninterrupted possession thereof; that upon learning, in the spring of 1894, of a defect in the record title to forty acres of the land, he offered to reconvey the property, and, without being ousted or disturbed in his possession, demanded the return of the purchase money, and a rescission of the sale, which being refused, he brought this suit, and, failing in the court below, appeals.

1. The gist of his contention is that the defendant falsely and fraudulently represented to him that the title to the land was perfect, when, in fact, he had no title whatever to forty acres thereof. But in this position he is not, in our opinion, supported by the testimony. There is not, as we read the record, a particle of evidence even tending to show that there was any misrepresentation or concealment by the defendant as to the title. All the

facts within his knowledge were fully communicated to the plaintiff prior to the purchase, and, while he may have said the title was perfect, it was but an expression of opinion based on such facts.

2. The defect in the title arises out of the fact that at the time of the sale the patent to a forty-acre tract, settled upon by the defendant's grantor, in 1879 as a homestead, had not been issued, although the final proof had been made and accepted, and final certificate issued. These facts were explained to the plaintiff, and the title was supposed by all parties to be good, and that the patent would issue in due course of business. But in April, 1894, the plaintiff having contracted to sell the land to a purchaser who demanded an abstract of the title, it was discovered for the first time that the forty-acre tract had been patented by mistake, as subsequently claimed by the land department, to the Coos Bay Military Wagon-Road Company four years before it was settled upon by the homestead claimant, and it is for this reason that plaintiff seeks to rescind the sale and recover his purchase money. But this defect can, at most, amount to nothing more than a failure of title; and the law is well settled that, in the absence of fraud, an executed sale of real estate will not be rescinded for that cause, but in such case the purchaser must look for protection to the covenants of the deed: *Earle v. De Witt*, 6 Allen, 520; *Slocum v. Bracy*, 56 Minn. 249 (56 N. W. 826); 2 Suth. Dam. p. 253. In this view, plaintiff is not entitled to the relief demanded.

3. But, in addition, the evidence shows and the court below found that the defendant and his grantors had been in the adverse possession of the disputed tract of land, claiming title thereto as against all the world ex-

cept the United States, for more than ten years prior to such sale, which was sufficient to vest in him a perfect title as against the wagon road company: *Parker v. Metzger*, 12 Or. 407-413 (7 Pac. 518). And, as he had the title of the government, it would seem that he was not even mistaken in asserting, at the time of the sale, that his title was perfect. So, however we may regard this case, there is no equity in the bill, and the decree of the court below must be affirmed.

AFFIRMED.

Decided at PENDLETON, August 13, 1898.

STATE v. WELCH.

[54 Pac. 213]

33	33
37	38
33	33
130	211

33	33
41	442

1. **CRIMINAL LAW—HARMLESS ERROR.**—Evidence that there was a "scheme" between defendant charged with larceny of sheep and other persons to get away with certain sheep of the prosecuting witness is not prejudicial to defendant on the ground that the word "scheme" suggested dishonesty and fraud where the witness testifies further that defendant wished to steal the sheep of the prosecuting witness and invited witness and another person to join in the theft.
2. **IDEM.**—Where witness testified that he thought he recognized a person whom he had seen taking away stolen property, error in permitting him to name such person was cured by his subsequent positive statement that he recognized defendant as the person.
3. **BIAS OF WITNESS—LIMIT OF CROSS-EXAMINATION.**—While it is always competent to show the feeling entertained by a witness toward a person about whom he is testifying (*State v. Ellsworth*, 30 Or. 145, cited), such inquiry must be limited to the feeling for or against that person.
4. **ERROR CURED BY SUBSEQUENT EVIDENCE.**—Error, if any, in refusing to permit a witness to be examined concerning his hostility towards accused's relatives was cured where his subsequent cross-examination disclosed his condition of mind towards such persons.
5. **IDEM.**—Where it is intended to impeach witness by showing contradictory statements the error of omitting from the impeaching question the date of the statements is cured by the answer of the witness showing that he understands the question: *Sheppard v. Yocum*, 10 Or. 403, and *State v. Ellsworth*, 30 Or. 145, cited and applied.
6. **IMPEACHMENT—PLACE WHERE CONVERSATION OCCURRED.**—The attention of a witness need not be called to any particular place in a small hamlet in an interrogatory made as a foundation for impeaching him by evidence of contradictory statements, especially where the witness admits meeting in such hamlet the person to whom the contradictory statements are alleged to have been made: *State v. McDonald*, 8 Or. 113, distinguished.

From Grant: MORTON D. CLIFFORD, Judge.

Otis Welch appeals from a judgment imposing a fine of \$600 for sheep-stealing.

AFFIRMED.

For appellant there was a brief over the names of *James A. Fee* and *Thornton Williams*, with an oral argument by *Mr. Fee*.

For the state there was an oral argument by *Mr. Chas. W. Parrish*, district attorney.

MR. JUSTICE MOORE delivered the opinion.

Otis Welch was indicted with one Lon Leathers for the larceny of ninety-seven sheep, the property of Emil Scharff, valued at \$145.50, and, being separately tried, was convicted. He appeals, assigning as error the action of the trial court in admitting and rejecting certain testimony, and refusing to instruct the jury to return a verdict of not guilty.

1. At the trial one Fred. Deford,—a witness for the state,—on his direct examination, was directed to state what he knew about any scheme between this defendant and others to get away with certain sheep of Emil Scharff's, which he had contracted for from Henry Welch and Mrs. Welch, and which he was to receive on or about May 28, 1896, if there was any such scheme, to which he responded, after an objection thereto being overruled: "Yes, sir, there was such a scheme. There was a scheme between the defendant and other parties." It is contended by defendant's counsel that the word "scheme," as so used, suggested dishonesty and fraud, and tended to create in the jurors' minds an unfavorable opinion of

their client, which was difficult to eradicate. The word complained of was probably intended to be used in the sense of plan, design or arrangement, and not as a suggestion of an unlawful enterprise ; but, however that may be, we cannot think defendant was prejudiced thereby, in view of the fact that the witness further testified, in substance, that Leathers and Welch wanted to steal Scharff's sheep, and made such a proposal to the witness and another person whom they invited to join in the theft.

2. Homer Hunsaker, having been called on behalf of the state, testified, in substance, that on May 28, 1896, between 4 and 5 o'clock in the evening, as he was returning from the town of Monument, he saw, a little over a quarter of a mile away, some person with a small band of sheep, which he drove about one hundred yards or more over a ridge, out of sight, into a gulch, and then rode away. Referring to the person whom he had seen at that distance, the witness was asked: "Did you recognize him?" to which he replied: "Well, I think I did, yes, sir." Q. "Well, who did you recognize him to be?" Defendant's counsel objected to the question, unless the witness could answer it of his own knowledge ; but, the objection being overruled, the witness said: "I recognized him to be Otis Welch." This witness further said that he went to the place where the sheep had been left, and found about one hundred head of wethers, a number of them being branded with a circle X, and others with an H ; corresponding, as the evidence shows, with the character, number and marks on the sheep which it is claimed were stolen from Scharff.

The court, on the cross-examination of Hunsaker, sustained an objection interposed by the state, and refused to permit the witness to answer the following question :

“Now, Mr. Hunsaker, you had some little trouble with the Welchs before; with Henry Welch or Mrs. Welch; some little hard feeling,—didn’t you?” The court, however, on further cross-examination of this witness, permitted him to testify that Mrs. Emma Welch (the person named in the preceding question) entered into a contract with him by the terms of which she agreed to pay him \$225 for his interest in a tract of public land upon which he lived, and that she refused to keep or perform her agreement. Referring to a subsequent interview with Mrs. Welch, he added: “Yes, sir; there was considerable of a conversation. She was giving me her opinion of me, and I spoke about the way her boys done, or had been doing; and she was telling me about what they told her about me, so I just asked her if they told her anything about what they had been doing. Q. It was kind of a mutual admiration society? A. We had had a little difficulty, and they had run to her and told her a lot of stuff that I had done, and I just asked her if they had told her about what they had done; and I then went on to relate two or three little things, and asked her if they had told her about that.” It is contended by defendant’s counsel that Hunsaker’s answer, to the effect that he thought he recognized the person whom he saw at the distance indicated, conclusively shows that he was not positive about the matter, and, such being the case, his testimony was insufficient as proof of defendant’s identity. It will be remembered that Hunsaker, in referring to the person whom he saw, said: “I recognized him to be Otis Welch”; so that, if any objection could be urged to the first answer given upon the question of identity, it was cured by the subsequent positive declaration of the witness. If Hunsaker had been unable to form more than an opinion as to the identity of the person in question, it would have been admissible in view of other tes-

timony received ; for he stated that the person so seen by him rode off and met two men, whom he took to be Emmet Cohorn and George Stubblefield, the former of whom, appearing as a witness for the state, testified that on May 28, 1896, he and Stubblefield were hunting for stray horses near Hunsaker's place, and saw defendant, who, as a witness, admits that he met them there, and went with them to look for some horses which he had also lost.

3. It is insisted that, inasmuch as the evidence shows that defendant was a minor living with his mother, the court erred in refusing to permit Hunsaker to answer the question whether he had any trouble with defendant's brother Henry or with his mother. In order that the testimony of a witness may receive the consideration to which it is entitled, it is essential that the judge or jury called upon to determine its proper weight should, as far as possible, ascertain the condition of the witness' mind, with a view of testing his credibility. Such inquiry necessarily involves a consideration of the relation he sustains towards, or the feelings of friendship he entertains for, the party in whose favor, or the enmity and wrath he nurses towards the party against whom, he testifies. All matters which tend in any manner to show the condition of his mind towards the party who may be benefited or injured by his testimony are proper subjects of investigation, and may be proved by competent evidence, either by the cross-examination of the witness himself, or by other witnesses who may be called to testify concerning such facts: Whart. Cr. Ev. § 477; 29 Am. & Eng. Enc. Law (1st ed.), 770; *State v. Bacon*, 13 Or. 143 (57 Am. Rep. 8, 9 Pac. 393). The extent of the inquiry is largely a matter resting within the sound discretion of the trial court, which, when exercised, will not be disturbed on appeal, except for an abuse thereof: *Da-*

vis v. State, 51 Neb. 301 (70 N. W. 984); *Vermont Machine Co. v. Batchelder*, 68 Vt. 430 (35 Atl. 378). But, when a court denies all inquiry into the condition of a witness' mind towards the party against whom he testifies, it is prejudicial error: *State v. Ellsworth*, 30 Or. 145 (47 Pac. 199). The law of the civilized world has become such a potent factor for the public good that it affords ample security to every member of society, and hence the necessity for protection from families or clans no longer exists, in view of which the right to scrutinize the mental condition of a witness applies only to the party to a suit or action who may be injured by his testimony: 1 Greenl. Ev. § 450; *State v. Dee*, 14 Minn. 35; *Scott v. State*, 64 Ind. 400; *State v. McCann*, 16 Wash. 249 (47 Pac. 443). Because Hunsaker might have entertained an unfriendly feeling towards Mrs. Welch and her son Henry, it does not necessarily follow that he was hostile to defendant, or that his prejudice could be augmented because he was a minor, or lived with his mother; but if such were the fact, however, it was incumbent upon his counsel to have limited the inquiry to defendant.

4. But if it were admitted, for the sake of this argument, that the court erred in refusing to permit Hunsaker to answer the question at the time it was asked, his subsequent cross-examination disclosed the condition of his mind towards Mrs. Welch and her sons, thereby correcting any error that might have been committed.

5. M. M. Brierly, a witness for defendant, testified, in substance, that on July 2, 1896, at Monument, in Grant County, he met Fred. Deford, who told him that, in order to save himself, he would have to testify against Otis Welch, and that, if he could get \$250, he would go away, and not appear as a witness against him. The

witness, on cross-examination, was asked and answered the following questions: "Is it not a fact, Mr. Brierly, that about that time—that day or the next—you saw Mr. Henry Welch also at Monument, and that you also saw Mr. Gus. Allen, another relative of this defendant, there? A. Yes, sir; I saw them both the next day. Q. And is it not a fact that you told Mr. Gus. Allen that you would send Mr. Deford to him? A. To Gus. Allen? Q. Yes, sir. A. No, sir; I never told him anything of the kind. Q. That he would come to him? A. No, sir; no such talk. I told Henry Welch on the third day—I told Henry Welch— He came to Monument the third day, and I told him this fellow's proposition; told him what Deford said." Gus. Allen being called as a witness for the state, in rebuttal, the following questions were asked him on direct examination: "I will ask you whether or not M. M. Brierly on the second or third of July, 1897, at Monument, had any conversation with you. A. Yes, sir. Q. In relation to Mr. Fred. Deford? A. Yes, sir." This question and answer were objected to on the ground that no proper foundation therefor had been laid, but the objection was overruled, and an exception allowed. "Q. Did or did not Mr. Brierly, in that connection, tell you that Mr. Deford would come to you to talk in relation to his going away, and not appearing as a witness in this case?" Same objection, ruling and exception as last above. "A. Why, he said— Yes; he said that he would come to have a talk." It is insisted by defendant's counsel that Brierly's attention was not attracted to the circumstances of time, place and persons present, so as to afford him an opportunity of refreshing his memory in relation to the conversation imputed to him by Allen, whose testimony contradicted that of an important witness for the defendant, and tended strongly to prejudice him in securing a fair and

impartial trial. Before a witness can be impeached by evidence that he has made at other times statements inconsistent with his present testimony, such statements must be related to him, with the circumstances of times, places and persons present; and he shall be asked whether he made such statements, and, if so, allowed to explain them: Hill's Ann. Laws, § 841. Does the preliminary question propounded to Brierly comply with the several requirements of this statute? is the question presented for consideration. It will be observed that the interrogatory does not fix any day, month or year upon which it is claimed that Brierly's alleged statement was made to Allen, except by referring to the date previously given by the witness, who, in answer to a question, admitted that he saw Allen on the next day after the one to which his attention was called, or the next day after he met and had the conversation with Deford, which he states in his direct examination occurred July second; so that, if any error existed in failing to comply with the statute in this respect, it was cured by Brierly's admissions: *Sheppard v. Yocum*, 10 Or. 403; *State v. Ellsworth*, 30 Or. 145 (47 Pac. 199).

6. In *State v. McDonald*, 8 Or. 113, the preliminary questions asked for the purpose of laying a foundation to impeach the prosecuting witness were as follows: "Between the time you lost your money and the time you went to Forest Grove, were you not on the streets of the City of Portland, with L. Besser, chief of police, looking for the men that got your money? And did you not see McDonald, one of the defendants, on the street? And did not L. Besser point McDonald out to you, and ask you if he was the man that got your money? And did you not then and there say to L. Besser: 'No; he is not the man. He don't look like the man. The man

that got my money was of a sandy complexion,'—or words to that effect?" The witness thereupon replied: "No; I never told Besser so. I did not tell Besser that McDonald was not the man that got my money." It was sought, by the testimony of Besser, to show that the witness had made the statement imputed to him; but the court refused to admit such testimony, and upon appeal its action was affirmed. Mr. Justice PRIM, speaking for the court, says: "The question propounded to the witness was indefinite as to the circumstances of time, place and persons present, and was properly overruled by the court." The only objection, as we view it, that could well have been urged to the primary question in that case, so far as it related to the place, was that it did not designate any particular part of the city to which the attention of the witness could have been attracted. In cities of the size and importance of Portland, one person might meet another in many places; and hence a mere reference to the city might not be sufficient to recall the circumstances which ordinarily ought to impress the witness, and thereby revive in his memory the interview to which his attention should be directed, in view of which greater particularity is demanded in describing the place of meeting in cities, villages and towns of importance. But this reason can have no application to hamlets, where the possibility of one person meeting another is necessarily confined to but few places; and, the reason for the rule failing, the rule might, without any violation of legal principle, be modified accordingly.

It must be admitted that Monument, in Grant County, is the place to which Brierly's attention was called; but the place is not, in our judgment, of such significance as to render a failure to call the attention of the witness to some particular part thereof such an error as to work a

reversal of the judgment, and particularly so when it is remembered that Brierly admits he met Allen at that place. In *Sheppard v. Yocum*, 10 Or. 403, it was held that section 841 of Hill's Ann. Laws is but declaratory of the common-law rule in relation to the impeachment of a witness by proof that he has made at other times statements which contradict testimony given by him at a trial, and that, when the circumstances of time and place have been detailed with particularity, the person to whom the imputed statement was made is the person present, within the meaning of the statute. It will be remembered that the question propounded to Brierly fixed the time of the supposed meeting with Allen in 1896, while the same question, as propounded to Allen, states the year to be 1897; but, as nothing is said by defendant's counsel upon the subject, it is altogether probable that the discrepancy arises from a typographical error in preparing the transcript.

We have carefully examined the testimony introduced at the trial, and, without quoting further therefrom, it was sufficient, in our judgment, if the testimony of DeFord and Hunsaker can be believed, to warrant the verdict found; and, this being so, the court committed no error in refusing to instruct the jury to return a verdict of not guilty. It follows that the judgment is affirmed.

AFFIRMED.

Argued 28 March; decided 30 April, 1898.

**FIRST NATIONAL BANK v. COMMERCIAL
ASSURANCE COMPANY.**

SAME v. PHOENIX ASSURANCE COMPANY.

[52 Pac. 1062]

33	43
133	190
233	235
33	43
43	351

1. **IMPEACHMENT OF WITNESS—EVIDENCE OF REPUTATION.**—An attempt to show on cross-examination that a witness has at other times made statements not in harmony with his testimony on the trial is not such an impeachment of his character as to let in proof of his general reputation for truth and veracity: *Sheppard v. Yocum*, 10 Or. 402, cited.
2. **FOUNDATION FOR IMPEACHMENT.**—An attempt on cross-examination to show by former declarations that a witness is corrupt is not a sufficient foundation on which to admit testimony of his good reputation for truth and veracity: *Sheppard v. Yocum*, 10 Or. 402, cited.
3. **TRIAL—PRESUMPTION OF INNOCENCE OF CRIME.**—Where the defense to an action on an insurance policy is that the property was intentionally burned, it is proper to charge the jury that the person charged with the crime is presumably innocent, and that such presumption should be considered in arriving at a verdict. This is not a legal presumption, but rather a natural presumption of fact arising from the experience of mankind that probably people will not commit criminal acts.
4. **INSTRUCTION—PROVINCE OF JURY.**—In an action on an insurance policy, where defendant accused insured of destroying the property, instructing the jury to consider the improbability that one will commit such an act as an element necessarily involved, does not invade the province of the jury.
5. **EVIDENCE INCONSISTENT WITH THEORY OF CASE.**—In an action upon an insurance policy where the defense is that the fire was incendiary by the procurement of the insured, testimony that one in the insured's employ was reputed to be an incendiary is inadmissible as too remote where the case was not tried upon a theory consistent with such employee's agency in causing the fire.

From Multnomah: ALFRED F. SEARS, Judge.

Separate actions by the First National Bank of Portland against the Commercial Union Assurance Company, and the Phoenix Assurance Company. The two actions were tried together and plaintiff had judgment. Defendants appeal.

AFFIRMED.

For appellants there was a brief over the name of *Cox, Cotton, Teal & Minor*, with an oral argument by *Mr. William W. Cotton*.

• For respondent there was a brief over the names of *Henry E. McGinn* and *Dolph, Mallory & Simon*, with an oral argument by *Mr. McGinn*.

Opinion by MR. JUSTICE WOLVERTON.

These are actions to recover upon certain policies of insurance against loss or damage by fire, assigned to plaintiff by *H. Wolf & Brother*, a firm composed of *H. Wolf* and *Marcus Wolf*, who were the assured under the policies; and both actions, being for losses by the same fire, were tried together in the court below. The sole defense interposed is that the said *H. Wolf* and *Marcus Wolf* did willfully, wrongfully and fraudulently set, and cause and procure to be set, fire to the property covered by said policy of insurance, whereby the same was burned, damaged and destroyed. The defendants, having the burden of proof, were permitted to open and close both with their proofs and argument at the trial. The order in which such proof was introduced does not clearly appear from the bill of exceptions, but it does appear that evidence was offered tending to show that the fire was of incendiary origin. Among the witnesses called was *John Zimmerlee*, who testified, among other things, that he resided at *Woodburn, Oregon*; that he was in *Portland* with one *Mitchell* on *July 20, 1896*; that, being near by, they saw a man open the door and come out of the store of *H. Wolf & Brother*, and that a puff of smoke came out as he did; that he shut the door with his right hand, looking directly over his shoulder, and then ran diagonally across the street; that witness

saw the face of the man when he turned his head ; that, when the man first came out of the building, Mitchell said, " Look at your watch, there may be something in that," and witness looked, and it was eight minutes after six o'clock, and that his watch was set by the clock on the Oregonian Building ; that the fire soon burst out of the building, and witness and Mitchell waited until the fire companies arrived ; that on the following morning, between eight and nine o'clock, witness went to the building, and saw a man there who looked to him the same as the one whom he saw coming out of the building the night before, and identified him as Jacob Wolf, the son of H. Wolf, one of the parties insured ; and that afterwards he saw Jacob Wolf, and recognized him, in another store occupied by H. Wolf. The witness was rigidly cross-examined, and, among other testimony, the following was adduced : " Q. Do you remember Mr. Wilkins, who was in this court on the former trial of the case? A. Yes, sir. Q. Did you speak to him, or did Mitchell speak to him in your presence on the night of the fire? A. I could not say whether he did or not. I don't recollect that he did. I recollect afterwards that Mitchell introduced me to him. Q. Didn't you, in the presence of the said Wilkins, and in the presence of the said Mitchell, no one else being present, state to him the full facts and circumstances, omitting to make mention of having seen any man come out of the store, or having seen any man cross the street, or having seen anything of the kind? A. I don't recollect that I spoke to him. I don't recollect seeing the man that night at all. Q. Did you go over to Mr. Wilkins' hotel on the east side of the river? A. Yes, sir. Q. Did you have a conversation with Mr. Wilkins there relative to the fire? A. Yes, sir. Q. I will ask you if you did not say to Mr. Wilkins at his hotel, some little time after the fire,—the exact

time I do not now remember,—when yourself and Mitchell and Wilkins and no one else was present, something like, ‘These are all the facts in the case. We want you to take this matter, and work it up for us’; and on his making the following answer to you, ‘All that you know don’t make any case; there is nothing to be worked up,’ you said, ‘Well, there is, and we just want you to make what you can out of it,’ or words to that effect? A. No, sir. Q. I will ask you if you did not state to John O’Neill, in the city of Portland, on or about the twenty-first day of June, 1896, on Fourth street, in this city, at a point where O’Neill was engaged in putting down some of these blocks, etc., * * * ‘I saw the Wolf fire, but I could not identify the man I saw coming away from there,’ or words to that effect? A. I told him I saw the Wolf fire. Q. Did you say anything like that? A. No, sir. Q. I will ask you if you did not say to John Manning, who lives at Woodburn, Marion County, Oregon, in the latter part of July, or early part of August, 1896, ‘John, take this case and work it up for me. You ought to get a thousand dollars out of the insurance company for what I know,’ or words to that effect? A. No, sir. * * * I spoke to Mr. Manning, and told him that Mitchell had went to Hough and employed him as an attorney to look the matter up without any consent of mine whatever; and I asked Mr. Manning when he was going to Portland. He said he would go down in a few days. Said I, ‘If you have time I wish you would go to the insurance company and see what they have done,’ and find out, if he could, what they had done. Q. In what way? A. If they had made any arrangement or anything. Q. What next did you do? A. Then I went to John Poorman and told Mr. Poorman the facts, or partially so. I don’t know as I told him everything. I told him I had valuable evidence for the

insurance company, and said : ' You go to Portland ; you are in the insurance business ; and find out what the insurance company will do, and tell them I have evidence I think is valuable to them, and that I am at their disposal.''' After the examination of the witness Zimmerlee, and before the plaintiff had opened its case, the defendants called as a witness W. L. Tooze, who was a citizen and resident of the town of Woodburn, for the purpose of establishing the good reputation of Zimmerlee for integrity, truth and veracity in the community in which he lived. Objection was made to the introduction of such testimony as irrelevant and incompetent, which objection was sustained by the court. This ruling is assigned as error, and constitutes the chief ground relied upon for a reversal of the judgment.

1. The defendants' contention is that the method pursued in the cross-examination of Zimmerlee, and the matters adduced by it, constitute such an impeachment of his character as to let in proof of his general reputation for truth and veracity in the community in which he lived. Two methods of impeachment are involved in the cross-examination. One was an apparent effort to show that the witness had made statements out of court not in harmony with his testimony, and the other an attempt to connect him with a scheme to barter his testimony to the insurance company, which it is claimed, if true, involves him in a crime which would render him unworthy of belief. The questions put touching his supposed conversations with Mitchell, Wilkins and O'Neil, wherein he omitted to make mention of having seen a man come out of the store and run across the street, are of the first. If the case had gone further, and these persons had been called and testified to the supposed contradictory statements, then the case would have been identical with

Sheppard v. Yocum, 10 Or. 402-413, wherein it was held that the proper foundation had not been laid for sustaining the witness by proof of his reputation for truth and veracity. That cause was well considered, and overruled the earlier case of *Glaze v. Whitley*, 5 Or. 166; so the question must now be regarded as settled, against the defendants' contention, on this phase of the controversy.

The second method adopted calls for a more extended inquiry, as the exact question involved has not yet received the consideration of this court. It concerns the question put to the witness touching his conversations with Wilkins and Manning relative to his knowledge of certain facts bearing upon the case, and the amount of money that the insurance company ought to pay for what he knew. The witness denied having made the statements as recited to him, but he admits having said to Manning, "I wish you would go to the insurance company, and see what they have done," and to John Poorman, "You go to Portland; you are in the insurance business; and find out what the company will do, and tell them I have evidence I think is valuable to them, and that I am at their disposal." The statute provides that evidence of the good character of a witness in any action, suit or proceeding is not admissible until the character of such witness has been impeached: Section 842, Hill's Ann. Laws. This provision is but declaratory of the common-law rule which prevailed prior to its enactment. A witness may be impeached by evidence that his moral character is such as to render him unworthy of belief, but not by evidence of particular wrongful acts, except that it may be shown, by the examination of the witness or the record of the judgment, that he has been convicted of a crime: Section 840, Hill's Ann. Laws. If, however, the question as to whether he has been guilty of a crime or other moral turpitude becomes a legitimate subject of

inquiry on the trial, his reputation for truth and veracity may be proved to rebut any imputations against his credit which the evidence of guilt makes against him.

In *Webb v. State*, 29 Ohio St. 351, defendant, who was charged with forgery, while a witness in his own behalf, gave evidence tending to show that he did not forge or utter the contract described in the indictment, but that he procured it from one Frank W. Hill, without knowledge of its true character, and produced other evidence tending to show that Hill had told divers persons that he (Hill) was managing the case, and running it sharp; that he had attempted to intimidate certain of defendants' witnesses, and had forged said contract himself. So, it was held that the witness' general character was involved in the controversy, and that it was proper to sustain him by evidence of his good reputation for truth and veracity: *Tedens v. Schumers*, 14 Ill App. 608, is also cited to the same point, and supports the doctrine. The plaintiff sued upon a duebill, and defendants pleaded accord and satisfaction by reason of plaintiff's theft of goods from their store while in their employ as clerk, and alleged that he admitted the theft, and agreed that the duebill should be surrendered in satisfaction of the goods stolen. Witnesses were produced, who gave evidence in support of the allegations of the answer; and it was held that it was such an attack upon the character of the plaintiff as that it laid a foundation for the introduction by him of proofs of his good character for truth. But the judgment was reversed by the supreme court (112 Ill. 263), which held that the facts of the case did not warrant the invocation of the rule, because it was thought the general character of the plaintiff had not been assailed; and it was observed that "mere contradictions, or different versions by witnesses, do not justify the rule that he may

call witnesses to support his character for truth. * * * Before he can do so, his general character must be attacked." The rule is stated in *Vernon v. Tucker*, 30 Md. 456-462, thus: "Where the character of the witness is impeached by matter brought out on the cross-examination, or by evidence aliunde as to character, the witness may be sustained by evidence of good character; but it must, in either case, amount to an impeachment of the character of the witness for truth." To the same effect, see 29 Am. & Eng. Enc. Law (1st ed), 821.

It is urged that the cross-examination of Zimmerlee was an effectual attack upon and an impeachment of his general character, and the rule here alluded to is invoked to sustain the proffer of evidence to show that his reputation for truth was good in the community in which he lived. We are convinced, however, that the attempted impeachment is not of the character claimed for it, and that, instead of going to the witness' general character for honesty and probity, it goes rather to the credibility of his testimony, and was calculated to affect its weight in the estimation of the jury. The matters which it is apparent the examiner sought to elicit by the cross-interrogatories alluded to would, if adduced, tend rather to show the bias of the witness towards the parties concerned. In this view the testimony was not collateral to the issue. It is legitimate to show on cross-examination the bias of a witness by his own statements made elsewhere, but, as a general rule, in an impeachment of this nature, a foundation must be laid, and the attention of the witness called to the time and place of the declarations showing bias: *Underhill's Ev.* § 354, and note 2 at p. 523; *Bradner, Ev.* § 19, p. 21. See, also, *Newcomb v. State*, 37 Miss. 383-402; *Queen's Case*. 2 Brod. & B. 284; *Bates v. Holladay*, 31 Mo. App. 162; *Consaul v. Sheldon*, 35 Neb. 247-254, (52 N. W. 1104); *Hamilton v. Manhattan Railway Co.*

(Super. N. Y.), 9 N. Y. Supp. 313; *State v. McFarlain*, 41 La. Ann. 686 (6 South. 728). The rule is similar to the one which requires that, before a party can be impeached by contradictory statements made out of court, his attention must be called to them, together with the time, place and persons present, which, if he denies or evades, may be established by other witnesses: *Baker v. Joseph*, 10 Cal. 173-178. In that case, BALDWIN, J., quotes from 2 Phillips, Ev. 435, as authoritative, as follows: "The rule that a witness ought to be cross-examined as to contradictory statements, before they can be admitted in evidence to impeach the credit of his testimony, has been extended, not only to contradictory statements, but also to other declarations of the witness, and to acts done by him through the medium of declarations or words; so that, if it is intended to offer evidence of former declarations of a witness, or of acts done by him touching the cause, not with a view to contradict his statement upon oath, but for the purpose of discrediting him as a corrupt witness, or as one who would corrupt other witnesses, in this case also it has been determined that the witness should be previously questioned as to them in cross-examination." This brings the case of *Sheppard v. Yocum*, 10 Or. 402, by analogy, quite in line upon principle with this as it respects the second contention, and must be considered decisive of it also. If the question put to the witness touching the attempted barter of the knowledge he possessed of the burning of the stock of goods had been answered in the affirmative, then the cross-examination would have served its purpose; but, having been denied or parried, it was competent to impeach his statements, for the purpose of establishing bias through the establishment of his alleged corrupt propositions to dispose of his testimony for a consideration. The effect of such testimony is to discredit the witness'

evidence, and not, in the legal sense, to impeach his general character, so as to let in testimony of his good reputation for truth and fair dealing. There was no attempt, therefore, at impeachment by an attack upon the witness' general character, but the purpose of the cross-examination was to establish his bias towards the defendant in the action, and thereby to discredit his testimony with the jury ; and the court committed no error in refusing to admit testimony of good reputation for truth and veracity.

2. It was urged with strong emphasis that very much depended upon the establishment of the witness' good character for truth and veracity and fair dealing, as the case turned upon the proper credit which should have been given to his testimony in the case ; that what the witness testified to touching his solicitude that the company should have knowledge of what he would swear to was susceptible of two constructions,—one in harmony with an honest purpose, and the other the very reverse ; and, if his good reputation had been established, it would probably have preponderated the cause in defendants' favor. This may all have been true, but it does not afford the ground upon which the testimony offered is made admissible ; and, unless the witness' general character is first assailed, there can be no proof admitted to establish it, as the law gives him one by presumption : *Hitchcock v. Moore*, 70 Mich. 112 (37 N. W. 914, 14 Am. St. Rep. 474).

3. The next question presented arises upon the following instructions to the jury : “ It is proper to say in this case that a natural presumption of innocence, where an act is charged of this nature, exists ; and you have a right to consider the improbability that one will commit an act of criminal nature as an element necessarily

involved. This you may consider as you should every material circumstance involved in the case; but, after viewing the whole case with such care as it demands, your verdict should be in accordance with the testimony and the proof." Two objections are urged: (1) That it treated the legal presumption of innocence as a circumstance to be weighed by the jury in determining whether the defendant had established its defense by a preponderance of the evidence; and (2) it invaded the province of the jury by stating that the improbability that one would commit a crime was a material circumstance to be considered by them.

The presumption of innocence is one of law, made statutory; but it belongs to the class which is denominated "disputable presumptions." Under the rule of evidence in civil cases, it unqualifiedly casts the burden of proof on the party who stands against its operation. It differs but slightly from strong presumptions of fact, the result of which is to compel the party who would dispel them to produce testimony to alter the weight of the evidence. Where the former are disregarded by a jury, a new trial will be granted as matter of right, but a disregard of any of the latter, however strong or obvious, is only ground for a new trial, at the discretion of the court: 19 Am. & Eng. Enc. Law (1st ed.), 58, 61, and Best, Ev. (Am. ed.) §§ 323, 327. Presumptions of fact are the natural presumptions which rest upon experience and observation of the course of nature, the constitution of the human mind, the springs of human action and the usage and habits of society. The presumptions of law, many of them, rest upon the same ground which the law simply recognizes and enforces. Many of them, however, are only partially approved by reason, and the law from motives of policy attaches to the facts which give to it an artificial effect beyond their natural ten-

dency to produce belief: Best, Ev. (Am. ed.) §§ 303, 305. Just so far as the presumption or maxim, as it may be termed where it does not proceed from proof, is founded upon reason and the experience of human kind, it has evidentiary value; and, in the determination of such value, the artificial effect given it by the edict of law must be eliminated,—that is to say, strike off the edict, and what is left will constitute a natural presumption, or one of fact, and this will be the measure of its evidentiary value.

Now, the court instructed the jury that a natural presumption of innocence existed in a charge of the nature under consideration, and assigned a reason for the presumption, viz., the improbability that a person will commit a criminal act. This was a logical presentation of the evidentiary value comprehended by the presumption for the consideration of the jury, which matter the court said the jury might consider as they would other material circumstances involved in the case. and that, upon the whole case, they should render a verdict in accordance with the testimony and the proof. It would seem that the instruction was technically and logically correct if such strictness and accuracy was necessary to sustain it, and it is in harmony with the authorities. Mr. Wharton says: "The better view is that in civil issues the result should follow the preponderance of evidence, even though the result imputes crime. Of course, as a factor in such a calculation is to be considered the presumption of innocence attachable to good character when character is unassailed." In *Hills v. Goodyear*, 4 Lea, 242 (40 Am. Rep. 5), the court say: "A mere preponderance, however slight, will still suffice to turn the scale; but, to sustain a finding of crime, it must be a preponderance sufficient to outweigh the opposing evidence of good character, if any, and the presumption in favor of innocence.

The court should instruct the jury upon the legal effect of the evidence of character or presumption of innocence ; and it is the duty of the jury to weigh these elements in connection with the other proof, in arriving at a conclusion on which side the preponderance exists." PINNEY, J., in *Bachmeyer v. Mutual Association*, 87 Wis. 325 (58 N. W. 403), says : " The question is one of fact for the jury, and the duty of the court is fully performed when it declares the existence of the presumption, and that it may be displaced or overcome by evidence in the case, the weight and effect of which is for their determination." In further support of the propriety of the instruction, see *Graves v. Colwell*, 90 Ill. 612 ; *Ellis v. Buzzell*, 60 Me. 209 (11 Am. Rep. 204) ; *Bradish v. Bliss*, 35 Vt. 326 ; *Mead v. Husted*, 52 Conn. 55 (52 Am. Rep. 554) ; *Jones v. Greaves*, 26 Ohio St. 6 (20 Am. Rep. 752) ; *Huchberger v. Merchant's Insurance Co.*, 4 Biss. 265 (Fed. Cas. No. 6,822) ; *Scott v. Home Insurance Co.*, 1 Dill. 105 (Fed. Cas. No. 12,533).

4. Nor does the instruction invade the province of the jury. The improbability that one will commit an act of a criminal nature constitutes the basis for the natural presumption of innocence, and it was not a comment upon the testimony, nor can it be said that the court gave undue weight to the presumption by its manner of referring to it. The cases cited by counsel for appellant in support of their contention are cases in which peculiar stress was laid upon the presumption, such as in *Bachmeyer v. Mutual Association*, 87 Wis. 325 (58 N. W. 399), wherein it was characterized as a strong one ; and in *Rothschild v. American Central Insurance Co.*, 62 Mo. 356, the attention of the jury was particularly called to the serious nature of the charge, thus giving undue promi-

nence to the presumption. The alleged vice of the instruction therein corrected does not obtain here.

5. Another question arose in this manner: Evidence was introduced and admitted tending to show that the fire which damaged the stock was of incendiary origin, and there was an attempt to show that H. Wolf & Brother were responsible for it. The defendants called George Butler as a witness in their behalf, and desired to show by him that he was acquainted with the general reputation of one Henry Jacobs; that, for a considerable time prior to the fire, H. Wolf & Brother had him in their employ in the store; and that he was reputed to be a fire bug or incendiary. But the court refused to allow the introduction of the testimony, and the action of the court in this regard is assigned as error. This testimony was too remote, and could not serve under the exigencies of the case to connect H. Wolf & Brother with the inception of the fire which caused the damage. The case was not tried upon a theory consistent with Jacobs' agency in causing the fire, and is wholly disconnected with any matter tending to fix the responsibility upon H. Wolf & Brother. The judgment of the court below will be affirmed.

AFFIRMED.

Decided at PENDLETON 13 August, 1898.

STATE v. HULL.

[54 Pac. 159]

LARCENY—CONSENT OF OWNER.—Property is not taken without the owner's consent, within the meaning of the term larceny, where an authorized agent of the owner co-operates with the suspected thieves in planning and carrying out the asportation.

From Baker: ROBERT EAKIN, Judge.

33	56
e45	572
33	56
d47	463

Fred. Hull and Earl Wheeler were convicted of larceny, and appeal.

REVERSED.

For appellants there was a brief and an oral argument by *Mr. William Smith*.

For the state there was a brief and an oral argument by *Mr. H. E. Courtney*, district attorney.

MR. JUSTICE BEAN delivered the opinion.

The defendants, Hull and Wheeler, were jointly indicted, but separately tried and convicted of the crime of larceny. Each appealed, and their respective appeals were heard and tried together in this court as one case, and will be so considered. The important question presented is whether the trial court erred in refusing to direct an acquittal, on the ground that the property alleged to have been stolen was taken with the consent and co-operation and assistance of the owner, through an agent employed for that purpose.

The facts, as they appear from the record, are that on September 7, 1897, one Prescott was employed by Perkins and five or six other men residing in and about Baker City, whose stock was being stolen from the range and butchered for the market, "to look after their cattle interest, and to detect, if he could, anybody molesting their cattle, stealing them, butchering them or doing them any damage." He was given full permission by his employers to butcher or use their stock in any way he might see proper "for the purpose of detecting who was stealing the cattle." Prescott immediately entered upon his employment, keeping his employers fully advised of his progress, and on the second of October informed them that Hull, Wheeler and himself were going out

that afternoon to round up a bunch of cattle, and to drive them that night over into Union County. It was thereupon arranged between him and his employers that he should proceed according to his agreement with the defendants, and that Perkins and the other parties, together with the sheriff, would secrete themselves at a certain point on the road along which it was proposed to drive the cattle, for the purpose of arresting Hull and Wheeler. In pursuance of this understanding, Prescott, Hull and Wheeler left Baker City about four o'clock in the afternoon, each going in a different direction, but meeting a few miles out of town, from whence they proceeded to a point called "Magpie Corral," gathering up cattle as they went. After reaching the corral, Wheeler held the cattle already gathered, while Hull and Prescott went out in different directions on the range, to gather up others; and after they had thus rounded up eighty-three head, they proceeded on their drive to Union County. Just before reaching the point where Perkins and the sheriff and his posse were secreted, Prescott rode ahead, to notify them, and, after ascertaining that everything was as planned, returned to his companions, advised them that the way was clear, and directed them to proceed. He, himself, however, fell behind, on the plea that his horse had given out.

When Hull and Wheeler reached a point in the road opposite where the sheriff and posse were in hiding, they were directed to halt, but, in place of doing so, began firing; and, after quite a fusilade between them and the sheriff's posse, they escaped, but were subsequently arrested, indicted, tried and convicted of stealing a cow belonging to Perkins, which was in the band. Prescott testified that he noticed the cow described in the indictment at Magpie Corral, and recognized her as the property of Perkins before the drive commenced. His atten-

tion was particularly drawn to her because she was crippled, and had a large lump on her side; and Wheeler suggested that she be cut out because of this blemish, but Hull said it was all right, as it would be dark, and she would not be noticed. On cross-examination he said: "We had the cow in the bunch when we first held the cattle there, about half a mile from the (Magpie) corral. When we drove the cattle, I knew that this particular cow was in there. Q. Did you intend to steal that cow? A. No. Q. Why didn't you cut her out? A. Fred said to leave her in. Q. Did you know whose brand and earmark that was? A. Yes, sir. Q. If you knew she was Perkins cow, if you had no intention of stealing her, why didn't you cut her out and let her go? A. I was employed to catch the other men. Q. Had Mr. Perkins employed you to do that? A. Gus Perkins did. Q. You knew it was to be put to that use, for that purpose, didn't you. A. Yes, it was. Q. How did you know it? A. Gus told me. Q. When did you obtain this information of these people? A. I think it was in September, — the seventh day of September." The witness, after further testifying, among other things, that, before starting out that day, he had a talk with Perkins, was asked: "Q. What did you tell him you were going to do? A. Round up a bunch of cattle, and drive them away. Q. Why did you tell him? A. Because I promised to. Q. What did he say when you told him that? A. He says, 'All right, we'll be out there.' Q. He said it was all right for you to round them up? A. Yes, sir. Q. And that they would be out there? A. Yes, sir. Q. And this animal, for the larceny of which this defendant is being tried, you recognized as being the property of Mr. Perkins when about half or three-quarters of a mile from Magpie Corral? I think you said you didn't

cut that out because Mr. Perkins told you that you could use it for the purpose if you wished? A. Yes, sir."

The manner in which Prescott obtained the confidence of Hull and Wheeler and their connection with the alleged larceny, was further detailed by him as follows: "I gained their confidence through a man by the name of Chumley. * * * Chumley came to me, and made me a proposition to go into this butcher business. I told him I would see, and it went on for several days. We had several talks, and finally he came to me, and told me, he says, 'Fred. Hull wants me to furnish him dressed beef.' I says, 'All right; what will he give us for it?' and he told me. I says, 'All right, we will do that; we will get a team.' * * * He was to get a team. He said Fred. Hull would furnish the team. I hadn't said anything to Fred about this work. In fact, Mr. Chumley told me he had spoken to Fred about my going in with him, and Fred didn't want to let me in. He said, 'But I will tell you what I will do; I will get you a man to work for you.' He said, 'All right.' So Chumley got me, and we got ready to go out, and the first trip something occurred; I don't remember what it was. Some one came to me, and said Fred. couldn't take the beef that night. So we didn't go. And it went on for two days, and Chumley and me took our horses and made a ride out through the country here. Fred. Hull had made him a proposition to buy some calves, that he could turn them over,—to steal some calves for him to turn over. And we went out to see if we could locate some calves. * * * I had not spoken to Hull about the matter. * * * The day after we came back from this ride was the first time I spoke to Hull. * * * Our first conversation was like this: I went to Fred, and I says, 'Chumley didn't get them cattle.' Chumley had come and told me he had quit. I says, 'That fel-

low's quit; what's the matter with us going on with this business?' He says, 'All right, we will do that.' He says, 'What can you do?' I says: 'We can go out there and get these cattle, and we can handle them. We can get all we want of them.' He says, 'All right;' so my first attempt was to go out and get some cattle,—three head. * * * The day before we started to drive the cattle, Hull made the proposition that if we got this hundred head of cattle, and drove them, and stole them, we would divide the money equally between him and Earl Wheeler and myself." When asked if anything was said by Hull as to what particular cattle were to be gathered up, the witness answered: "He said his preference was Joe Geddes', Steve Osborn's and brand '16' cattle, belonging to Mrs. Harrison;" but the witness testified that the cattle taken included a large number belonging to other parties, and especially to the persons by whom he was employed. Perkins was called by the state, and testified concerning the employment of Prescott and his duties; that he was given full authority by his employers to use or butcher any stock belonging to them if necessary to gain the confidence and secure the detection of the persons who were stealing the cattle; that he (witness) was advised on the morning of the second of October, by Prescott, of the drive intended to be made that evening, and assented thereto; that he arranged with Prescott to be in waiting with the sheriff and posse at the place agreed upon, for the purpose of arresting the defendants, Hull and Wheeler, and was there in pursuance of such arrangement.

Based upon these facts, the inquiry is whether the taking by the defendants of the property alleged to have been stolen was such a trespass as will support the charge made. To constitute the crime of larceny, as charged in the indictment, there must be a trespass, that is, a tak-

ing of the property without the consent of the owner. It is therefore evident that the crime is not committed when the taking is by the consent, however morally guilty the taker may be. This is elementary law. But the difficulty lies in determining when the taking is by the consent of the owner in cases where he lays a plan to entrap a suspected thief. Upon this subject Mr. Bishop says: "The cases of greatest difficulty are those in which one, suspecting crime in another, lays a plan to entrap him. Consequently, even if there is a consent, it is not within the knowledge of him who does the act. Here we see, from principles already discussed, that, supposing the consent really to exist, and the case be one in which, on general doctrines, the consent will take away the criminal quality of the act, there is no legal crime committed, though the doer of the act did not know of the existence of the circumstance which prevented the criminal quality from attaching. But exposing property, or neglecting to watch it, under expectation that a thief will take this property, or furnishing any other facilities or temptations to such or any other wrongdoer, is not a consent in law": 1 Bish. Cr. Law (5th ed.), § 262. And in *Williams v. State*, 55 Ga. 395, Mr. Justice BLECKLEY, in his usual clear and lucid style, puts the law thus: "It seems to be settled law that traps may be set to catch the guilty, and the business of trapping has, with the sanction of courts, been carried pretty far. Opportunity to commit crime may, by design, be rendered the most complete; and, if the accused embrace it, he will still be criminal. Property may be left exposed for the express purpose that a suspected thief may commit himself by stealing it. The owner is not bound to take any measures for security. He may repose upon the law alone, and the law will not inquire into his motive for trusting it. But can the owner

directly, through his agent, solicit the suspected party to come forward and commit the criminal act, and then complain of it as a crime, especially where the agent to whom he has intrusted the conduct of the transaction puts his own hand into the *corpus delicti*, and assists the accused to perform one or more of the acts necessary to constitute the offense? Should not the owner and his agent, after making everything ready and easy, wait passively, and let the would-be criminal perpetrate the offense for himself in each and every essential part of it? It would seem to us that this is the safer law, as well as the sounder morality, and we think it accords with the authorities: 2 Leach, 913; 2 East, P. C. c. 16, § 101, p. 666; 1 Car. & M. 218; *Dodge v. Brittain*, Meigs, 86; *Kemp v. State*, 11 Hump. 320; *State v. Covington*, 2 Bail. 569. It is difficult to see how a man may solicit another to commit a crime upon his property, and, when the act to which he was invited has been done, be heard to say that he did not consent to it." And, again, in *Love v. People*, 160 Ill. 508, (43 N. E. 713), Mr. Justice PHILLIPS says: "It is safer law and sounder morals to hold, where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act by one acting in concert with such owner, that no crime is thus committed. The owner and his agent may wait passively for the would-be criminal to perpetrate the offense, and each and every part of it, for himself, but they must not aid, encourage or solicit him that they may seek to punish."

Within the rule announced by these decisions, and which we take to be the settled law (*State v. Adams*, 115 N. C. 775 [20 S. E. 722]; *Connor v. People*, 18 Colo. 373 [36 Am. St. Rep. 295, 25 L. R. A. 341, 33 Pac. 159]; *Thompson v. State*, 18 Ind. 386 [81 Am. Dec. 364, and note]),

it is clear the evidence in this case was insufficient to justify a conviction of the defendants of the crime charged in the indictment. It appears from the uncontradicted evidence that the animal which they are charged to have stolen was taken, not only by the consent and passive acquiescence of the owner, but by his express direction, and upon the advice and with the active co-operation and assistance of his agent. There was no trespass committed in the taking, and there was no taking without his consent. Prescott, who was acting by his authority and under his direction, with full power to use the animal as he might see proper, was not only present at the time of the taking, but actively assisted in planning the whole affair, and in the perpetration of the acts necessary to constitute the crime. He assisted in rounding up the cattle, and driving them out of the county, by the express consent and authority of the owner. The property having been thus taken with the owner's consent, and by the active assistance of his agent, it makes no difference legally, although it does morally, that the defendants did not know of such direction and consent, and that they supposed and believed they were stealing the property in fact. The case upon this point is no different in principle from what it would have been had the owner, instead of acting through Prescott, acted in person, and himself assisted the defendants in rounding up and taking the animal in question, the defendants not knowing him to be the owner, but believing him to be a thief and a confederate of theirs. In such case it would not be seriously contended that the defendants were guilty of larceny in taking an animal belonging to their supposed confederate, and no more can such a contention be maintained on this record. It follows that, however morally guilty the defendants may have been, their conviction is not justified by the evidence, nor warranted by the law ; and the

judgment is therefore reversed, and the cause remanded for such further proceedings as may be deemed proper, not inconsistent with the opinion.

REVERSED.

Argued 21 April; decided 23 June, 1898.

STEMMER v. SCOTTISH INSURANCE COMPANY.

[49 Pac. 588; 52 Pac. 498]

33	65
184	54
33	65
37	324
38	530
33	65
43	186

INSURANCE—LEGALITY OF ARBITRATION.—The valued policy act of this state (Laws 1893, p. 133), which provides that "in case there is a partial destruction of the property insured, no greater amount shall be collected than the damages sustained," does not affect the right of the parties to arbitrate a partial loss, either on a building or on personal property.

MEANING OF WORDS USED IN THE INSURANCE STATUTES.—The words "full amount of such loss," as used in section 3577 of Hill's Annotated Laws, and the expression "damages sustained" found in the fire insurance act of 1893, unquestionably mean indemnity.

IDEM.—The words "other causes" in the report of appraisers to determine the loss under a policy of insurance stating that they considered the several elements pointed out in the agreement of arbitration which tend to measure the amount of the loss, and "other causes," will, under the maxim *ejusdem generis*, be held to refer to such causes as tend to fix the full amount of the loss, and do not invalidate the award.

WAIVER OF OBJECTION TO ARBITRATOR.—Where a party to an arbitration knows at the time the other party selects its arbitrator that he is a nonresident, a failure to object will be deemed a waiver of that objection.

EXPERIENCE OF ARBITRATOR NO OBJECTION.—The prior service of an arbitrator in a similar capacity does not render him incompetent, or invalidate an award in which he joined, in the absence of evidence showing that he was prejudiced.

CONCLUSIVENESS OF AWARD.—The determination by appraisers appointed by the parties is final and conclusive in the absence of fraud or misconduct on their part, the rule being that an award deliberately and honestly made will not be set aside merely for an excess.

INADEQUACY OF AWARD.—Where there is competent evidence to show that the loss claimed by the insured upon a portion of his property is only about one-third the amount claimed, an award of arbitrators which cuts his entire loss down in about the same proportion will not be set aside on the ground of inadequacy.

REJECTION OF TESTIMONY BY ARBITRATORS.—While it is a general rule that if appraisers exclude material testimony it will be fatal to the award, it is also true that testimony must be offered before it can be rejected; so that, where the insured only announced that he was willing to produce witnesses on a certain point, without actually offering them, it cannot be said that the arbitrators rejected pertinent testimony.

SECRECY OF DELIBERATIONS.—Arbitrators chosen to fix the amount of a fire loss need not reveal their estimate of loss upon the various articles as they fix upon the same, but may defer the giving of such information until the award is made.

MISTAKE OF LAW.—An honest error by arbitrators in applying the rules of evidence does not constitute a valid reason for setting aside the award.

IMPLEMENTS OF TRADE.—Stationery and unfilled glove boxes are not included within the term "All other kinds of implements of trade."

REMEDY AT LAW—JURISDICTION OF EQUITY.—A court of equity, after sustaining an arbitration and award in a suit to set aside the award and recover on the policy, cannot decree a recovery as to items not submitted to arbitration, for there is an adequate remedy at law by an action for their value.

INTEREST ON THE AWARD.—Where an insured sues to set aside an award, he should not be allowed interest until the decree is entered, for, having rejected the award, there was nothing on which to compute interest: *Hawley v. Dawson*, 16 Or. 344, and *Pengra v. Wheeler*, 24 Or. 532, cited.

ACCEPTING BENEFIT OF DECREE—WAIVER OF RIGHT TO APPEAL.—Pending the hearing of a case on its merits the appellate court will not make an order allowing appellant, without prejudice to his right of appeal, to draw from the clerk of the trial court the money that respondent had deposited there under the decree appealed from, where the acceptance of the money without such an order would have been a waiver of the right to appeal: *Portland Construction Co. v. O'Neil*, 24 Or. 54, applied.

From Multnomah: LOYAL B. STEARNS, Judge.

For appellant there was a brief and an oral argument by *Messrs. John W. Whalley and Thomas O'Day*.

For respondents there was a brief over the name of *Dolph, Mallory & Simon*, with an oral argument by *Mr. Joseph Simon*.

This is a suit by Solomon Stemmer against the Scottish Union and National Insurance Company and others, to set aside the awards of arbitrators, and to recover upon certain policies of insurance the amount of loss claimed to have been sustained by fire. The facts are: That plaintiff was the owner of and operated a glove factory at Portland, Oregon, and kept therein a stock of gloves, skins, leather and other material and goods, besides tools and machinery used in manufacturing gloves. On October 14, 1895, a fire occurred in said factory,

resulting in damage to the goods, machinery, etc., at which time insurance policies, issued by the following companies to plaintiff, were in force thereon, viz.: The Prussian National Insurance Company for \$4,250, covering the following property: \$525 on fifteen assorted machines; \$100 on empty boxes; and \$3,625 on a stock of gloves, finished and unfinished, and on material for finishing the same, including a stock of skins, whips and lashes and other material used in a glove factory; The Scottish Union and National Insurance Company for \$3,300 as follows: \$2,000 on a stock of skins, gloves, and materials for manufacturing the same; \$50 on stationery; \$50 on scales, laying-off tools, button machines and eyelet machines; \$200 on press and tools belonging thereto; \$1,000 on cutting dies, blocks, and other implements of trade; The Magdeburg Fire Insurance Company for \$2,000 on stock of skins and gloves, and on material for manufacturing the same; and the Western Fire Insurance Company for \$2,200 as follows: \$2,100 on the stock of skins and gloves and materials for manufacturing same, and \$100 on fixtures. Each policy permitted concurrent insurance, and also contained a provision to the effect that, in the event of disagreement as to the amount of loss in case of fire, the same should be ascertained by two competent and disinterested appraisers, plaintiff and the insurance company each to appoint one, and the persons so chosen to select a competent and disinterested umpire, after which the appraisers were required to estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, they were to submit their differences to the umpire, and the award in writing of any two was to determine the amount of such loss. The insurance adjusters representing the several companies being unable to agree with plaintiff as to the amount of his loss, entered into an

agreement with him by which they selected one Godfrey Fisher, of San Francisco, and plaintiff chose Isaac L. White, of Portland, to appraise the damage on the stock of skins and gloves, and the material for manufacturing the same, and also the stock of whips and lashes, and the persons so selected appointed one W. P. Olds umpire; and, in like manner, W. B. Honeyman and A. Gaudron were appointed to appraise the damage to the tools and machinery, and the latter selected one Bert Hicks as umpire. In pursuance of their appointment, Fisher and White appraised the damage to the stock of skins, gloves, etc., at \$3,213, and Honeyman and Gaudron estimated the damage to the tools, machinery, etc., at \$528, and the awards having been made in writing, plaintiff brings this suit to set them aside, alleging that Fisher was not an impartial or disinterested appraiser, but was, at the time of his appointment, in the employ of the defendant companies, and was so employed with the understanding that he would appraise and make the losses as light as possible, which fact was at that time unknown to plaintiff; that plaintiff, desiring to procure as an appraiser some person who had experience in the glove business and was acquainted with the value of gloves and of the stock from which they are manufactured, attempted to select either Abraham Dryer, T. Dittenhoefer, Julius R. Haas or Frank Deitch, but defendants refused to permit him to appoint either of them, and urged him to appoint White, stating that, if he did not do so, they would deny all liability, but if White was appointed they would consent to the arbitration, and would pay the amount awarded; that neither Fisher nor White was familiar with or knew the value of the goods or materials insured under said policies; and plaintiff having discovered, after their appointment, that they were not experts in this line, appeared before them and

offered proof of the true value of such goods and materials, and also tendered the evidence of competent witnesses as to such value and damages, but the appraisers refused to hear said testimony, or permit plaintiff to show the extent of his loss or damage, which is alleged to be \$11,741.67, on the following goods: \$5,794.17 on manufactured gloves; \$1,050.59 on gloves in process of manufacture; \$290.88 on materials used in manufacturing gloves, \$72 on whips and lashes, \$3,376.28 on a stock of skins, \$1,085.25 on machines, tools, etc., \$395 on sewing machines and \$272 on stationery, empty boxes, etc., — which sums were included in plaintiff's proof of loss, and are sought to be recovered in this suit.

The cause being at issue, a trial was had, and the court found, from the evidence taken before it, the facts, in substance, as hereinbefore stated; and also "that said appraisement so demanded and entered into by plaintiff and defendants was honestly, fairly and deliberately entered into by plaintiff, and, in the selection of Isaac L. White as appraiser, said plaintiff was in no way overreached, deceived or in any manner imposed upon, but that said Isaac L. White was the voluntary choice of plaintiff as an appraiser, and said Isaac L. White acted in said appraisement, and the award made, fairly, honestly and according to his best judgment; that there was no fraud, bad faith or deception in the appraisement made by the said appraisers, or in the award by them, and said appraisement and award was regularly, fairly and honestly conducted and made, and is binding upon the parties thereto." Similar findings having been made as to the award of Gaudron and Honeyman, the court apportioned the award against the insurance companies as follows: To the Scottish Union and National Insurance Company, \$723.50; the Prussian National Insurance Company, \$1,564.95; the Magdeburg Fire In-

insurance Company, \$659.35; and the Westchester Fire Insurance Company, \$793.20; and ordered that neither party recover costs,—from which decree plaintiff appeals.

AFFIRMED.

MR. CHIEF JUSTICE MOORE, after making the foregoing statement, delivered the opinion of the court.

It is contended by plaintiff's counsel that their client, having agreed upon a submission of differences to arbitration, sought to select some reputable and competent person to estimate the amount of his loss, and to that end proposed the names of several individuals possessing these qualifications; but that E. P. Farnsworth and A. J. Wetzler, insurance adjusters representing the defendant companies, after objecting to each name so proposed, suggested the name of Isaac L. White, claiming that he was well qualified for the position, and stating that, if plaintiff did not accept White as his appraiser, they would deny all liability; and that, in view of this threat, their client, against his wish, was compelled to accept White, and that such conduct on the part of defendants' agents rendered the award void. It is impossible to reconcile the testimony on this branch of the case. Plaintiff and one of his employees named J. B. McClosky testified that Farnsworth and Wetzler made these statements, and that the threat was uttered in a "stage whisper." But Farnsworth and Wetzler each deny the statements entirely, except that the former admits that they objected to the name of one person proposed by plaintiff, because the person so suggested was doing business with, and furnishing material to, plaintiff, for which reason they considered him not impartial. Farnsworth says that plaintiff, after finding that he could not obtain other persons whom he desired, on account of business engage-

ments, voluntarily suggested the name of Isaac L. White, with whom, at that time, they were unacquainted, but, having heard that he possessed an excellent reputation as an upright citizen, no objection was made to him. The testimony of this witness is corroborated by that of William Church, Jr., who was present when the appraisers were appointed, and says that White's name was proposed by Stemmer. The trial court had the advantage of seeing the witnesses, hearing them testify, and noting their manner and bearing on the stand, for which reason it was in a better position to judge of their credibility than it is possible for this court to do from an inspection of the record; and, having found against plaintiff on this issue, we are impelled to adopt its conclusions in this respect.

It is maintained that the agreement entered into by the parties for the submission to appraisers, and the method adopted by the persons so selected in appraising and determining the amount of plaintiff's loss by the fire, were in contravention of the public policy adopted by the state, and hence the awards should be set aside. In thus contending, counsel proceeds upon the theory that the act of the legislative assembly of February 21, 1893 (*Laws 1893, p. 133*),* operated to take insurance on buildings

*NOTE.—Section 3577, Hill's Ann. Laws (passed February 24, 1887), is as follows: "Any fire insurance company doing business within the state shall, in case of a loss by fire, pay to the insured the full amount of the policy, or the amount for what he or she is insured; *provided*, that the property destroyed be worth at the time of the loss the full amount for which it was insured. In case the property destroyed is not worth the full amount for which it was insured, then, and in such case, the said company shall pay the insured the full value of the property insured. In case of partial loss, then, and in such case, the said company shall pay to the insured the full amount of such loss; *provided*, the amount of the policy of such insured be sufficient to cover such loss." Act of February 21, 1893: "The amount of insurance written in a policy of insurance on all buildings insured after the passage of this act shall be taken and deemed the true value of the property at the time of the loss, and the amount of the loss sustained, and shall be the measure of damage, unless the insurance was procured by the fraud of the insured, or the loss was caused by the criminal act of the assured. It shall be lawful for any insurance company liable to pay losses occasioned by fire to

out of the provisions of section 3577, Hill's Ann. Laws,* and to render insurance on personal property a valued policy. Assuming, without deciding, that an insurance company and the insured could not enter into a contract inhibited by the alleged public policy, and that the act of 1893 so amended section 3577 of our statutes as to bring about the result insisted upon, do the agreements to submit the question of the amount of loss to appraisers violate any public policy? The agreement for submission required the appraisers to estimate, at the true cash value, the loss or damage by fire, and, in doing so, "to take into consideration the age, condition and location of said property previous to the fire, and also the value of the material, or any portion of said property, saved; and, after making an estimate of the cost of repairing or replacing said property, a proper deduction shall be made by them for the difference between the value of new or replaced property and the property insured and destroyed or damaged. Said appraisers are hereby directed to exclude from the amount of damage any sum for previous depreciation from age, location, ordinary use, or any cause whatever, and simply to arrive at the damage actually caused by said fire." The appraisers, in pursuance of their appointment, reported as follows: "Having carefully and accurately estimated and appraised the loss and damage by fire of October 14, 1895, to the property of S. Stemmer, agreeably to the foregoing appointment, we hereby report that, after having taken into consideration the age, condition and location of the property previous to the fire, and making proper deductions for the materials and portions of the

rebuild any structure or building wholly or partially destroyed of the same style and materials and of equal value with the one so wholly or partially destroyed, but they shall make their election so to do within thirty days after notice of loss. In case there is a partial destruction of the property insured, no greater amount shall be collected than the damages sustained."—REPORTER.

property saved, also making deductions for depreciation and other causes, we have appraised and determined the damage to be as per schedule hereto annexed and made a part hereof." The act of 1893 provides that "in case there is a partial destruction of the property insured, no greater amount shall be collected than the damages sustained." It will thus be seen that, if the act in question converted an insurance on personal property into a valued policy, the amount expressed therein is not payable except in case of total loss.

The total value of the property covered by the several policies, at the time of the fire, is claimed by plaintiff in his proof of loss to have been \$19,623.31, while it will be remembered that the aggregate amount of the several policies is \$11,750, and the amount of loss claimed to have been sustained is \$11,741.67 only; from which it will be observed that the loss is only partial, in which case it was incumbent upon the insurance companies, under the provisions of section 3577, to pay "the full amount of such loss," and, under the act of 1893, "no greater amount shall be collected than the damages sustained." These terms, "full amount of such loss," etc., undoubtedly mean indemnity (Ostrander on Fire Insurance, § 156; 1 Wood on Fire Insurance, § 41), to arrive at which must necessarily involve a consideration of several questions. The agreement for submission was tantamount to written instructions, given by the interested parties to the appraisers, to guide them in ascertaining the amount of plaintiff's loss. True, the appraisers, following these instructions, reported that they considered the several elements which tended to measure the amount of the loss and "other causes," but this phrase must be used in the light of the submission, which instructed the appraisers simply "to arrive at the damage actually caused by said fire"; and hence "other causes" must be

understood to mean, under the maxim of "*ejusdem generis*," such causes as might tend to fix the full amount of such loss, and to aid them in making an award equivalent to the **damages** sustained. We do not think the agreement for submission, or the **award** made in pursuance thereof, violate any public policy which the state seeks to promote.

It is insisted that the agents of said insurance companies falsely represented to plaintiff that Godfrey Fisher, who resided in California, was impartial, and possessed such qualifications as rendered him competent, under the terms of the policies, to act as an appraiser of losses sustained by fire, and that plaintiff, being unacquainted with him, had no opportunity to inform himself as to the truth of such representations, and hence relied thereon; and that Fisher had been frequently employed by insurance companies to appraise their losses, in consequence of which he was not impartial; and that such employment and his nonresidence rendered him ineligible to act as an appraiser. It is undoubtedly true that it was the duty of each party to select an impartial appraiser, but experience teaches that selfishness is ordinarily the mainspring of human conduct, in view of which each party would probably seek to appoint an appraiser who was friendly, at least, to the one who selected him; thus imposing upon the other party the duty of closely scrutinizing the character, reputation and qualifications of the person so chosen by his adversary: *Fox v. Hazelton*, 10 Pick. 275. Plaintiff at the time of Fisher's appointment knew that he resided in California, and, if his residence tended to render him ineligible, a failure to except him must necessarily be deemed a waiver of any objection on that ground: 2 Am. & Eng. Enc. Law (2d ed.), 637; Morse, Arb. 100.

It is admitted that Fisher had been appointed by both insurers and insured to appraise losses sustained by fire, and it does not appear that plaintiff was aware of this fact when the appointment was made in the case at bar. But Fisher's prior service as an appraiser ought not necessarily to have rendered him incompetent. If a person so appointed faithfully discharges his duty by carefully considering the issues which have been submitted to him and renders a conscientious award thereon, his experience ought to render him more competent to try similar questions rather than to render him ineligible on account thereof. We are unable to say, from a careful inspection of all the evidence, that Fisher had formed a preconceived opinion on the subject matter of the submission, or that he was biased or prejudiced against either party.

It is maintained that the inadequacy of the award is so gross as to warrant the court in setting it aside. In *Bradshaw v. Agricultural Insurance Co.*, 137 N. Y. 137 (32 N. E. 1055), the court having found that an award made by appraisers was \$989.61 less than the amount of damage sustained by a fire, and that an appraiser selected by the insurance company, whom it falsely represented to the insured as an impartial person, was not disinterested, set aside the award; but this result must have been reached as a consequence of the prejudice of the appraiser instead of the inadequacy of the award, or, perhaps, the combined elements of prejudice and inadequacy afforded the reason for the decree rendered. If an award is adequate, the assured could not be injured thereby, and hence it would seem that a court of equity would be powerless to set it aside, however prejudiced the appraisers may have been. In the absence of fraud or misconduct on the part of appraisers in the discharge of their duties, their determination is final and conclusive,

the rule being that an award deliberately and honestly made will not be set aside merely for an excess: *Nutter v. Taylor*, 78 Me. 424 (6 Atl. 835) ; *Port Huron Railway Co. v. Callanan*, 61 Mich. 22 (34 N. W. 678) ; *Goddard v. King*, 40 Minn. 164 (41 N. W. 659) ; *Ellicott v. Coffin*, 106 Mass. 365 ; *Davis v. Henry*, 121 Mass. 150 ; *Underhill v. Van Cortlandt*, 2 Johns. Ch. *339. The amount of damage claimed to have been sustained by plaintiff is \$11,741.67, while the amount awarded by the appraisers, on account thereof, is only \$3,741,—a difference of \$8,000,—but the disallowance of this sum, though comparatively large, is not alone sufficient to warrant us in setting aside the award when the evidence on which it is based is considered. Plaintiff, in the proof which he submitted to the insurance companies, claimed to have sustained a loss of \$1,085.25 on machines, tools, etc., and \$395 on sewing machines. These items being considered by the appraisers, A. Gaudron and W. B. Honeyman, they estimated the damage thereto to be but little more than one-third of the amount claimed, to wit, \$528. The evidence shows that Mr. Honeyman is a manufacturer of, and dealer in, machinery, tools, etc., and as a witness he testified that he was ready and willing to repair and put the machinery, tools, etc., in as good condition as they were at the time of the fire for the amount of damages awarded thereon. The evidence also shows that the witness has had much experience in his line of business. From this award, the amount of which is not seriously controverted by plaintiff, it is evident that the claim of loss on this class of property was very much overestimated. Plaintiff claimed to have lost on the other property covered by the insurance the sum of \$10,261.42, according to an estimate, as in the case of the machinery, tools, etc., made by persons selected by himself. The damage to this class of property was esti-

mated by Fisher and White at about one-third of the amount claimed to have been sustained thereon, to wit, \$3,213; and this being about the same percentage allowed on the claim for machines, tools, etc., by Messrs. Gaudron and Honeyman, it would seem to follow that it is equally correct, and hence the alleged inadequacy of the award is not so gross as to authorize a court of equity to set it aside: *Morris v. Ross*, 2 Hen. & M. 408; *Pierce v. Perkins*, 17 N. C. 250.

It is claimed that Fisher and White excluded evidence which tended to show the amount of damage sustained, thereby denying to plaintiff a hearing on the merits of the controversy and rendering the award invalid. The rule is quite general that the exclusion of pertinent and material testimony by the appraisers is usually fatal to the award: 2 Am. & Eng. Enc. Law (2d ed.), 655; *Morse*, Arb. 142; *Mosness v. German Insurance Co.*, 50 Minn. 341 (52 N. W. 932); *Van Cortlandt v. Underhill*, 17 Johns. 405; *Canfield v. Watertown Insurance Co.*, 55 Wis. 419 (13 N. W. 252); *Citizens' Insurance Co. v. Hamilton*, 48 Ill. App. 593; *Hart v. Kennedy*, 47 N. J. Eq. 51 (20 Atl. 29). An exception to this rule seems to be that if the persons selected as appraisers possess peculiar skill or knowledge concerning the subject matter, and it appears that the parties to the submission intended to rely upon such skill or knowledge, the appraisers will be justified in refusing to hear evidence (*Morse*, Arb. 143; *Hall v. Norwalk Insurance Co.*, 57 Conn. 105, 17 Alt. 356); but, however this may be, it is admitted that neither of said appraisers possessed any peculiar knowledge of skins or other material used in manufacturing gloves, so that, if they be regarded in the light of ordinary arbitrators and rejected material evidence to plaintiff's prejudice, it necessarily follows that the award should be set aside. The evidence tends to

show that plaintiff was present when Fisher and White examined the stock and manufactured goods that had been injured by the fire, but he was not permitted to volunteer any information concerning his loss, his answers being confined to such questions as were propounded to him by the appraisers. He was not permitted to know what amount of damage the appraisers had placed upon any of the stock or goods until the award was made, whereupon he stated to the appraisers that he would not accept the amount awarded, and notified them that he intended to offer further testimony. The appraisers called one Mathiesen, a competent witness, who estimated the value of the skins used in the manufacture of gloves at from twenty-five to one hundred per cent. more than the invoice prices; but plaintiff claims that they relied upon their own knowledge as to the damage to such material, and not being experts they did not know the effect of heat upon leather and skins and refused to hear any evidence which would have enlightened them on the subject, and consequently did not make a reasonable allowance on account thereof. Stemmer, referring to what he said to Fisher and White when they were appraising this material, testified as follows: "I told them time and time again I was willing to bring in any information from people that were capable and understood that class of goods to give them information"; to which he says the appraisers replied that: "If we need to we will get them ourselves." Godfrey Fisher, one of the appraisers, in his deposition, states that: "Mr. Stemmer never to my knowledge offered to produce any evidence which we rejected." While plaintiff may have been willing to have brought in persons who would have testified concerning the amount of his damage, he did not produce a single witness, and such being the case it cannot be said that the appraisers

rejected material testimony. Testimony must be offered before it can be rejected, and a statement of a party's willingness to bring in witnesses is not a production of testimony. As we understand it, the appraisers simply refused to permit plaintiff to participate in their deliberations when making a memorandum of the losses upon which the award was based. In other words, they declined to listen to the advice of counsel, but we are unable to find from a careful perusal of the testimony that the appraisers rejected any evidence that was offered.

The appraisers used pasteboard cards on which they noted the number and character of the goods examined, and, when they had agreed upon the amount of damage resulting thereto, a memorandum thereof was entered in books kept by each appraiser, without permitting plaintiff to see or know what was being done. Plaintiff's counsel complain of this method of keeping the appraisal from the knowledge of their client until the award was made, but it is manifest that the course adopted was prudent; for, if the interested parties were permitted to examine the work or to understand the deliberation of the appraisers as it was progressing, it is possible that, unless the amount agreed upon tallied with the expectations of the parties, a controversy might ensue which would tend to destroy the free agency of the appraisers and render the award the mere conclusion of the parties.

The evidence also shows that one Charles R. Hallett, immediately after the fire, was employed by the insurance companies to guard the damaged property, and was performing that duty when the appraisers arrived; and, being called as a witness, he testified that he was instructed not to permit anyone to enter the building unless it was satisfactory to Fisher; that Stemmer seemed to be trying to give the appraisers information; and that

the hardest job he had was to keep Stemmer back; and that Fisher frequently said to Stemmer: "You keep back; we don't wish for your services at all." This testimony is corroborated by that of Fisher, who says: "Stemmer seemed to be talking once or twice in there, and I told Mr. White that 'I am doing business with him, and I certainly don't want anybody else to be looking around here and interrupting our work.'" Fisher, in assigning a reason for his treatment of Stemmer, says: "According to the articles of agreement, he waived his right, and I thought he had no right on the premises." There is no stipulation in the agreement of submission by which Stemmer waived his right to be present at the appraisalment of his loss, or to give testimony concerning the amount of damage he had sustained. But, notwithstanding Fisher thought Stemmer had no right on the premises, he was allowed to remain and answered such questions as were propounded to him touching the value of his goods. True, Fisher mistook the law applicable to the case under consideration before the appraisers, but an honest error in the application of the rules of evidence does not alone constitute a valid reason for setting aside an award (*Johnson v. Noble*, 38 Am. Dec. 485); and, if the rule were otherwise, Stemmer, by not offering testimony, acquiesced in this erroneous judgment.

It is maintained that certain stationery, envelopes, boxes, fixtures, etc., which were covered by the insurance and injured by the fire, were not embraced within the submission or award, and, having been damaged by the fire to the extent of \$272, the court erred in its refusal to decree a recovery of that amount in addition to the award. The evidence shows that the Prussian National Insurance Company of Stettin had in its policy "\$100 on empty boxes," the Scottish Union & National Insurance Company "\$50 on stationery," and the West-

chester Fire Insurance Company "\$100 on furniture and fixtures." The submission to Fisher and White contained the following clause: "The property on which loss and damage is to be estimated and appraised is on stock of skins and gloves, manufactured and in process of manufacture, and on materials for manufacturing the same, all while contained in the third floor of the brick building situate on the southeast corner of First and Stark streets, Portland, Oregon; also a stock of whips and lashes on same premises." The submission to Gaudron and Honeyman embraced the following: "The property on which loss and damage is to be estimated and appraised is scales, laying-off tools, button machines and eyelet machines, press and tools belonging thereto, cutting dies, blocks and all other kinds of implements of trade, fifteen assorted machines, furniture and fixtures, all while contained in the third floor of the brick building situate on the southeast corner of First and Stark streets, Portland, Oregon." It will be observed that the submission to Gaudron and Honeyman included "furniture and fixtures," and the evidence shows that the appraisers estimated the damages resulting thereto at \$165, which was included in their award, and, such being the case, the question of "stationery and boxes" only remains to be considered.

Plaintiff, in his proof submitted to the defendant companies after the award was made, claimed the following as total loss: "Stationery, \$50; empty boxes, \$25." But their counsel insist that the damage to the "stationery, boxes, fixtures," etc., was duly considered by the appraisers, and included in the general award, and due compensation made therefor. In *New York Wood-Working Co. v. Schnieder*, 119 N. Y. 475 (24 N. E. 4), Mr. Justice GRAY, in commenting upon the extent of an

award, says: "In the absence of some positive proof of neglect or refusal by the arbitrators to decide any of the particular matters presented under the submission, the presumption holds good that their award covers all of the submission." While it will be presumed that all matters within an issue which have been submitted to appraisers have been passed upon by them when the award is made, it cannot be presumed that the award includes matters not embraced within the submission: 2 Am. & Eng. Enc. Law (2d ed.), 740; Morse, Arb. 367. It clearly appears that the award did not include "stationery and boxes," unless these were embraced within the term "all other kinds of implements of trade." "Implements" are defined in Anderson's Law Dictionary to be: "Things necessary to any trade, without which the work cannot be performed." From this definition it is quite evident that the work incident to the manufacture of gloves could be performed without "empty boxes" to encase such goods, or "stationery" to promote or advertise plaintiff's business; and, such being the case, we do not think these items were submitted to or embraced within the award of the appraisers.

This omission, however, does not authorize a court of equity, in case the award is upheld, to decree a recovery on the demand which was not submitted, because for this the party injured thereby has an adequate remedy at law: *Birby v. Whitney*, 5 Me. 192; *McDonald v. Bacon*, 4 Ill. 428; *Pritchard v. Daly*, 73 Ill. 523. The rule that when equity obtains jurisdiction of a cause for one purpose it will retain it until complete justice is administered can have no application to the case at bar, for jurisdiction to set aside an award cannot attach except for misconduct of the arbitrators or mistake in the award: *Hartford Fire Insurance Co. v. Bonner Mercantile Co.*, 44 Fed. 151 (11 L. R. A. 628). Mr. Chief Justice MARSHALL,

in *Carnochan v. Christie*, 24 U. S. (11 Wheat.) 446, commenting upon the decision of arbitrators, concisely states the rule as follows: "But the award ought itself to settle finally and conclusively the whole matter referred to them. It is contrary to the principle of a general reference that the court should take the award so far as it goes and supply all omissions by its decree. The award ought to be, in itself, a complete adjustment of the controversies submitted to the arbitrators."

It is also claimed that the plaintiff is entitled to interest on the amount found to be due him from the time of his loss until the decree was rendered. The suit is not prosecuted to recover the amount awarded, and the damage sustained by plaintiff, although ascertained by the appraisers, was unliquidated until the decree was rendered, for which reason there was no error in refusing to allow interest: *Hawley v. Dawson*, 16 Or. 344 (18 Pac. 592); *Pengra v. Wheeler*, 24 Or. 532 (34 Pac. 354). It follows that the decree is affirmed.

AFFIRMED.

Decided July 26, 1897.

ON MOTION FOR LEAVE TO DRAW MONEY ON DEPOSIT.

[49 Pac. 588.]

PER CURIAM. This is a motion by plaintiff for an order permitting him to withdraw certain sums of money deposited by the defendants with the clerk of the circuit court of Multnomah County, in pursuance of a decree rendered against them. It is alleged in the complaint that plaintiff, having been engaged in manufacturing gloves in the City of Portland, insured his stock of goods, material, machinery, tools, etc., with the defendants, and, while the policies received were in force, a fire occurred, without his fault, design or procurement, in consequence

of which his property so insured, which was then of the value of \$19,623.31, was partially destroyed, thereby entailing a loss of \$11,741.67; that thereafter the agents of the defendants, refusing to make any proper offer to settle said loss, and taking advantage of a clause contained in each of said policies, induced the plaintiff to agree to the appointment of appraisers to adjust the same, in pursuance of which an appraiser was nominated by the plaintiff, and another by the defendants, and these persons so named selected another, who was not impartial or disinterested, but had theretofore been and was in the habit of appraising losses by fire in which the defendant companies were interested; that the persons so selected estimated the value of the property insured at the sum of \$13,088, and the loss on the stock of goods and material at \$3,213, and on the tools and machinery at \$528. The suit was instituted to set aside the award of the appraisers, and the answer of defendants, after denying the material allegations of the complaint, avers that plaintiff caused the insured property to be burned; that the loss thereby occasioned did not exceed the sum of \$3,213 on the stock of goods and material, and the additional sum of \$528 to the machinery, etc.; and pray that the said submission to arbitration and the awards made by the appraisers be decreed valid and binding, and the amount so determined by the appraisers be found to be the loss sustained by plaintiff by reason of said fire, if any loss he has sustained thereby, and for further relief. A reply having put in issue the allegations of new matter contained in the answer, a trial was had, resulting in an affirmance of the award made by the appraisers, which was apportioned to the defendants as follows: Scottish Union and National Insurance Company, \$723.50; Prussian National Insurance Company, \$1,564.95; Magdeburg Fire Insurance Company, \$659.35; Westchester

Fire Insurance Company, \$793.20. The defendants thereupon deposited with the clerk the several amounts so found to be due, but plaintiff, refusing to accept the same, appeals from the decree thus rendered, and moves in this court for an order permitting him to withdraw the sums so deposited, without prejudice to his right of appeal.

It has been held in this state that where the pleadings admitted a certain amount to be due at all events, and such sum had been voluntarily tendered or paid after judgment or decree, the amount so tendered or paid may be accepted by the prevailing party, without waiving his right of appeal: *Portland Construction Co. v. O'Neil*, 24 Or. 54 (32 Pac. 764). "A party," says COCKRELL, C. J., in *Bolen v. Cumby*, 53 Ark. 514 (14 S. W. 926), "may prosecute his appeal from a judgment partly in his favor, and partly against him, even after accepting the benefit awarded him by the judgment; *provided*, the record discloses that what he recovers is his in any event; that is, whether the judgment be reversed or affirmed. But he waives his right to an appeal by accepting a benefit which is inconsistent with the claim of right he seeks to establish by the appeal." See also 2 Beach's Mod. Eq. § 926 and notes. The plaintiff, realizing the force of the rule announced in these cases and that his receipt for the moneys so deposited would be tantamount to an affirmance on his part of the award which he seeks to set aside, refused to accept the amount so decreed by the court. The effect of granting plaintiff's motion would be a practical affirmance of the decree appealed from without a hearing on the merits, and since he has refused to withdraw the money for fear of the consequences on the right to maintain the appeal, we, without attempting to pass upon the issues made by the pleadings, must also decline to make the order requested for fear our act might be construed as legislating in the interest of the future conduct

of the parties instead of applying the law to their past transactions. The motion must therefore be denied, and it is so ordered.

MOTION OVERRULED.

Decided at PENDLETON, 13 August, 1898.

STATE v. ASH.

[54 Pac. 184]

1. COMPOUNDING CRIME—DEFENSES.—One charged with compounding and agreeing to conceal a crime for a consideration (Hill's Ann. Laws, § 1839) cannot set up as a defense that he subsequently arrested and prosecuted the person whom he had agreed to protect.
2. IDEM.—An officer of the law who agreed for a reward to compound a crime and not to prosecute the guilty parties cannot escape responsibility for his conduct by showing that he acted under the direction of his superior officer and gave him the entire consideration.

From Baker : ROBERT EAKIN, Judge.

J. L. Ash, having been convicted for a crime, appeals.

AFFIRMED.

Messrs. Esteb & Wench for appellants.

Mr. Hugh E. Courtney, district attorney, for the state.

MR. JUSTICE BEAN delivered the opinion.

The defendant, having been convicted for compounding and agreeing to conceal a crime for reward, by receiving and accepting, on July 18, 1897, while a police officer of Baker City, the sum of \$5 from the keeper of a bawdy house, under a promise and agreement that such payment would protect her from prosecution for one month, brings the case here on appeal, assigning error of the trial court in sustaining the objection of the state to evidence offered by the defense, and in refusing to give cer-

tain instructions to the jury. A detailed statement of the facts is unnecessary. It is enough that they were amply sufficient to justify the verdict. The receipt of the money by the defendant is admitted, and the question of his intent and purpose in taking it was properly submitted by the court to the jury, and its findings are conclusive on that point.

1. The first, fourth and fifth assignments of error relate to the ruling of the court in denying the defendant the right to show that he caused the arrest and secured the conviction of the prosecutrix in September, 1897, for keeping a bawdy house during the time he is alleged to have agreed to shield her from prosecution, and in refusing to instruct the jury that by reason thereof he should be acquitted. There is no merit in either of these positions. The arrest and conviction sought to be proven were long after the crime charged in the indictment had been fully consummated, and after defendant had been indicted therefor; and it is no defense to a prosecution for compounding a crime, under the statute, that the defendant subsequently institutes a prosecution against the party whom he promised to protect. The statute makes it a crime for any person having knowledge of the commission of a crime to receive or accept any gift or gratuity, valuable consideration, or thing whatever, or any promise to do or cause to be done any act beneficial to such person, with the understanding or agreement, express or implied, to compound or conceal such crime, or not to prosecute therefor or give evidence thereof: Hill's Ann. Laws, § 1839. Under this statute the offense is complete when the consideration or thing of value is received, or promise made, with such understanding or agreement; and a subsequent violation by a guilty party

of his agreement is no defense to his prosecution, whatever may have been the rule at common law.

The second and third assignments of error relate to the refusal of the court to permit the defendant to show that prior to the time he received the money of the prosecutrix he had been directed by the chief of police to make such collections, and that two or three days after he received the money he turned it over to his superior officer. But there was no error in the ruling on either of these points. If the defendant, as the jury found, corruptly exacted a sum of money from the prosecutrix upon his agreeing to conceal her crime and not to prosecute or give evidence against her, he is guilty under the statute, although he retained no part of the consideration (*State v. Ruthven*, 58 Iowa, 121, 12 N. W. 235), and it would be no defense that he was acting under instructions of another.

2. The sixth assignment of error is that the court refused defendant's request to charge the jury that, before they could find him guilty of the crime charged, they must be satisfied that there was an intent on his part, in receiving the money from the prosecutrix, to compound a crime, and in determining such fact they should inquire whether the defendant received the money for his own personal benefit or gain, or for the city, under real or supposed instructions from the city or its officers, and that they must also take into consideration what disposition he made of the money, and whether he did conceal the fact that the prosecutrix was keeping a bawdy house, or refuse to prosecute or give evidence against her. For reasons already suggested, this proposed instruction embodied matter wholly immaterial to any issue in the case, and was therefore properly refused.

All the material and important parts thereof were covered by and embodied in the general charge.

And finally it is claimed that the statute under which the defendant was indicted does not apply to the compounding or concealing of crimes in violation of city ordinances. But there is no such question in the record. The general laws of the state make it a crime to keep or set up a bawdy house (Hill's Ann. Laws, § 1867) and there is no intimation in the record that the defendant was not indicted for compounding, or agreeing not to punish or give evidence against the prosecutrix for a violation of that statute. Finding no error in the record, the judgment of the court below is affirmed.

AFFIRMED.

Decided 30 April, 1898; rehearing denied.

HAYDEN v. PEARCE.

[52 Pac. 1049]

1. **JOINT AND SEVERAL JUDGMENT.**—In an action against several defendants on an alleged joint demand, there cannot be a joint judgment against some of them for part of the claim and against others or another for another part. Under section 93, Hill's Ann. Laws, there cannot be a joinder of distinct causes of action against parties severally liable.
2. **WHEN WRIT OF REVIEW WILL LIE.**—Where a misjoinder of causes of action appears on the face of the complaint the plaintiff should be required to elect on which cause he will proceed; but when the defect is not apparent until the judgment is entered a writ of review will lie to correct the error.

From Marion : HENRY H. HEWITT, Judge.

Appeal from an order of the circuit court dismissing a writ of review from a justice's court.

REVERSED.

For appellants there was a brief and an oral argument by *Messrs. William H. Holmes and William M. Kaiser.*

For respondent there was an oral argument by *Mr. John A. Carson*, with a brief over the name of *Carson & Fleming*, urging this point.

At common law this judgment could not be sustained, but in Oregon it is no longer necessary to obtain judgment against all the joint parties : See sections 60 (sub. 3), 244 and 245, Hill's Ann. Laws.

These sections have been considered by this court, and it has been declared that it is proper to enter a several judgment in an action founded upon a contract which is either joint or several or both. The true criterion is whether or not a separate action might have been maintained, and if it could a several and separate judgment is proper : *Sears v. McGrew*, 10 Or. 48 ; *Ah Lep v. Gong Choy*, 13 Or. 205 ; *Hamm v. Basche*, 22 Or. 513.

The following authors support the view that in a case like this a several judgment might properly be entered : Black on Judgments, § 236 ; Freeman on Judgments, § 43 ; Pomeroy's Code Remedies (3d. ed.), § 290 ; *Aulbach v. Dahler* (Idaho), 43 Pac. 192 ; *Hubbell v. Wolf*, 15 Ind. 204 ; *Carmen v. Whitaker*, 26 Ind. 509 ; *Stafford v. Nutt*, 51 Ind. 535 ; *Hempey v. Ransom*, 33 Ohio St. 313.

MR. JUSTICE BEAN delivered the opinion.

This is an appeal from a judgment of the circuit court dismissing a writ of review, and affirming a judgment of a justice's court. The facts are that on July 27, 1895, the defendant in this proceeding commenced an action in the justice's court for Salem District against Ben. and Clell Hayden to recover \$121.76 upon an account for goods, wares and merchandise alleged to have been sold and delivered by his intestate to the defendants jointly. Both defendants were served with process, and answered separately, denying all the material allegations of the complaint. Upon the trial it appeared that the account sued on was made up in part of sundry items of goods, wares and merchandise sold and delivered to the defend-

ants jointly, and in part of goods sold and delivered to the defendant Ben. Hayden individually ; whereupon the court segregated the several amounts due, and entered judgment against the defendants Ben. and Clell Hayden jointly for \$76.90, and a several judgment against Ben. Hayden for the remainder, and the only point on this appeal is whether such judgment is valid.

1. At common law, in an action brought against two defendants on an alleged joint demand, a judgment could not be rendered against both for a part of the amount sued for, and a several judgment against one for the remainder, because (1) in such an action a judgment must be given against all the defendants or none ; and (2) causes of action against two or more defendants could not be joined with a cause of action against one of them separately. The first of these objections, however, is obviated by sections 244 and 245 of our statute (Hill's Ann. Laws), the effect of which is that "when in an action upon a joint contract it is determined that one or more of the defendants are not liable, but that one or more of the others are, judgment may be given and rendered against those liable, whether their liability be joint or several, and the other defendants may be dismissed": *Tillamook Dairy Association v. Schermerhorn*, 31 Or. 308 (51 Pac. 438). But these sections are only intended to obviate the objection of a variance between the allegations and the proof, and to enable the plaintiff to recover one judgment against such of the defendants as may appear from the proof to be liable, notwithstanding the fact that other parties may be made joint defendants. They do not authorize different judgments in one action upon independent causes of action which, both at common law and under our statute, cannot be joined. It is expressly provided by statute that the causes of action which may

be united in one complaint "must affect all the parties to the action" (section 93, Hill's Ann. Laws), and this is but declaratory of the common law, and prohibits a joinder of separate and distinct causes of action against parties severally liable: Bliss on Code Pleading, § 123; *LeRoy v. Shaw*, 2 Duer, 626; *Trowbridge v. Forepaugh*, 14 Minn. 133; *Langevin v. City of St. Paul*, 49 Minn. 189 (51 N. W. 817). It is clear, therefore, that if the complaint had stated the causes of action according to the facts as found by the justice, it would have been bad on demurrer, and the plaintiff would have been compelled to amend by striking out one cause of action or the other; and he cannot evade the effect of a misjoinder by alleging a joint cause of action, when in fact his proof shows that he is attempting to recover upon a cause of action against the defendants jointly, and also a cause of action against one of them severally.

This question was directly involved in *Leonard v. Robbins*, 13 Allen, 217. In that case the plaintiff brought a joint action against several defendants on several promissory notes, and the jury found a verdict against all the defendants on some of them, and against only one defendant upon one of the notes; and it was held that separate judgments according to the findings of the jury could not be entered, but that the plaintiff must elect whether he would take judgment against all the defendants for the amount of the notes on which they had been found jointly liable, or against the one for the amount of the note on which he alone had been found liable.

2. When the misjoinder appears from the complaint it should be taken advantage of by demurrer, and the plaintiff required before trial to elect upon which cause of action he will proceed; but, as it does not appear on the record in this case until the judgment, resort may be

had to the writ of review for the correction of the error by a superior tribunal. It follows that the judgment of the circuit court must be reversed and set aside, and the cause remanded with directions to modify the judgment of the justice's court by dismissing as to the defendants jointly, and giving judgment against Ben. Hayden on his several liability, or by dismissing as to him individually, and giving judgment against him and his co-defendant on their joint liability, as the plaintiff may elect.

REVERSED.

Decided at PENDLETON, 18 August, 1898.

STATE v. HINKLE.

[54 Pac. 155]

88 98
41 230

1. **DUPPLICITY—WAIVER OF OBJECTION—AIDED BY JUDGMENT.**—Error in overruling a demurrer to an indictment for duplicity is not waived by a plea of not guilty or cured by a judgment of conviction: *State v. Jarvis*, 18 Or. 300, cited.
2. **INDICTMENT—DUPPLICITY.**—An indictment which in the same count charges the defendant as an accessory before the fact in the crime of murder, for which, under Hill's Ann. Laws, §§ 1289, 1729 and 2011, he may be found guilty as a principal and punished with death, and also as an accessory after the fact, the punishment for which, under §§ 1290, 2012, 2014, is imprisonment in the penitentiary, is bad for duplicity.
3. **DECLARATIONS OF CO-CONSPIRATOR AS EVIDENCE.***—Statements made by a co-conspirator after the common enterprise has ended, and not in the presence of the accused, are not competent evidence against the latter: *State v. Magone*, 32 Or. 206, approved and followed.

From Grant: MORTON D. CLIFFORD, Judge.

Richard Hinkle was convicted of manslaughter and appeals.

REVERSED.

For appellant there was a brief over the names of *James A. Fee* and *Thornton Williams*, with an oral argument by *Mr. Fee*.

* NOTE.—Previous Oregon decisions to the same effect are: *Sheppard v. Yocum*, 10 Or. 417; *Osmon v. Winters*, 30 Or. 178; *State v. Tice*, 30 Or. 457, and *State v. Magone*, 32 Or. 206.—REPORTER.

For the state there was an oral argument by *Mr. Chas. W. Parrish*, district attorney.

MR. JUSTICE MOORE delivered the opinion.

The defendant, Richard Hinkle, was tried upon an indictment, the charging part of which is as follows: "On the fifth day of December, 1895, in the county of Grant and State of Oregon, one William Bare did then and there feloniously, and of deliberate and premeditated malice, and in the commission of a robbery, and in the attempt to commit a robbery, kill one George A. Scott, by then and there purposely, and of deliberate and premeditated malice, and feloniously, and in the commission of a robbery, and in the attempt to commit a robbery, shooting and striking him, the said George A. Scott, in and upon the body of him, the said George A. Scott, with dangerous weapons, the names and descriptions of which weapons are to the grand jury unknown, and the said William Bare then and there being within shooting and striking distance of him, the said George A. Scott, and the said Richard Hinkle did then and there and theretofore feloniously, purposely, and of deliberate and premeditated malice, aid, incite, encourage and abet the said William Bare in the commission of said murder in manner and form as aforesaid, and did thereafter, in said county and state, feloniously, and of deliberate and premeditated malice, counsel, harbor and conceal the said William Bare, and conceal the evidence of said murder, and assist in the burning and consuming of the body of him, the said George A. Scott, contrary," etc.; and the said Hinkle, having been convicted of the crime of manslaughter, was sentenced to imprisonment in the penitentiary for a term of fifteen years, and to pay a fine of \$2,000, from which judgment he appeals.

1. It is contended by defendant's counsel that the indictment charges the commission of more than one crime, and, having demurred to the duplicity, the court erred in overruling the demurrer, for which reason the judgment ought to be reversed. The statute, in prescribing the manner of stating facts constituting an offense, provides that the indictment must charge but one crime, and in one form only (Hill's Ann. Laws, § 1273), and any violation of this rule is a ground of demurrer (Id. § 1322); but, if a demurrer for the duplicity be interposed and overruled, the objection to the pleading is not waived by a plea of not guilty, nor is the error cured by a judgment of conviction: *State v. Jarvis*, 18 Or. 360 (23 Pac. 251).

2. In view of this rule, can it be said that the indictment in question charges the commission of two separate and distinct offenses? This inquiry necessarily involves a consideration of the several methods of determining duplicity in an indictment. Except in a few instances, in which the perpetration of one crime involves the commission of another, or where one crime is necessarily included within another, the rule is well settled that if the same count in an indictment charge the commission of two offenses, for which the statute imposes different penalties, or if an indictment, in violation of the provisions of a statute, charge in separate counts the commission of more than one crime, the duplicity, if made available by demurrer or appropriate motion, is sufficient to procure the arrest or reversal of a judgment rendered upon such pleadings: *Ben v. State*, 58 Am. Dec. 234, and exhaustive notes; *Com. v. Symonds*, 2 Mass. 163; *People v. Wright*, 9 Wend. 193; *Greenlow v. State*, 4 Humph. 25; *Burgess v. State*, 44 Ala. 190; *McGahagin v. State*, 17 Fla. 665; *State v. Wood*, 13 Minn. 121.

Applying this rule to the case at bar, it will be observed,

from an inspection of the first part of the averment of the indictment, so far as it relates to Hinkle, that he is charged as an accessory before the fact; but, the common-law distinction between such an accessory and a principal having been abrogated in this state, the statute makes him a principal, in view of which he might have been indicted, tried and punished as such, thus rendering him, in case of conviction, subject to the death penalty: Hill's Ann. Laws, §§ 1289, 1729, 2011; *State v. Steeves*, 29 Or. 85 (43 Pac. 947). It will also be seen that the second clause of the indictment, applicable to defendant, charges him as an accessory after the fact, and hence, upon conviction thereof, he could only have been punished by imprisonment in the penitentiary not less than one nor more than five years, or by imprisonment in the county jail not less than three months nor more than one year, or by fine not less than \$100 nor more than \$500: Hill's Ann. Laws, §§ 1290, 2012, 2014. Hence, it clearly appears that the same count in the indictment charges two offenses, punishable by different penalties, and, such being the case, it is manifest that duplicity exists in the pleading.

Duplicity may also be said to exist when evidence which tends to prove one charge fails to establish the other, or when a judgment of acquittal or conviction upon one charge is ineffectual as a plea in bar to the other. In either case, it is evident that the indictment is vulnerable to attack by demurrer, or may be successfully assailed by a motion to quash in those jurisdictions which prescribe the latter course: *State v. Abrahams*, 71 Am. Dec. 399. Evidence tending to prove that Hinkle aided, incited, encouraged and abetted Bare in the commission of the offense would not, in our judgment, tend to establish the fact that he counseled, harbored and concealed his alleged associate or concealed the evidence of his crime. It is

evident, also, that, if defendant were acquitted or convicted as an accessory before the fact, he could not successfully interpose the judgment as a plea in bar to an indictment charging him as an accessory after the fact. By means of these several tests it will be seen that the indictment in question charges the commission of more than one crime, and hence the court erred in overruling the demurrer.

3. It is also contended that the court erred in permitting Henry Strickland to testify, over defendant's objection and exception, in substance, that, after Bare had been tried and convicted for killing Scott, he told the witness, in Hinkle's absence, that, in pursuance of an agreement with the latter, he killed Scott in an attempt to rob him; that he thereupon informed Hinkle of what he had done, and the latter went with him to the scene of the homicide, from which they took the body of their victim to, and deposited it in, a deserted cabin, against which they placed Scott's cart, whereupon they set fire to the building, and, after it was burnt, Hinkle hid the irons from the cart, and killed Scott's mare. It is urged that, if it be admitted that a conspiracy had been entered into between Bare and Hinkle, in pursuance of which Scott's life was taken, the unlawful enterprise had been fully performed before Bare was tried and convicted, and, while he might have appeared as a witness against Hinkle, his admissions, made after the crime was fully committed, were clearly inadmissible at the trial of his alleged confederate, who, under the organic law of the state, was entitled to meet the witnesses face to face: Const. Or. art. 1, § 11. In *State v. Magone*, 32 Or. 206 (51 Pac. 452), the point insisted upon was considered and decided as contended for, the court saying: "The rule is universal that after a conspiracy has terminated, either suc-

cessfully or in defeat, the admissions of one conspirator, by way of recital of past facts, is a confession of his own participation, and they are admissible against himself, but are not admissible against his companions in the unlawful enterprise." In addition to the authorities cited in that case, see, also, as illustrating this principle, the following: Whart. Cr. Ev. § 699; *State v. Pike*, 51 N. H. 105; *State v. Arnold*, 48 Iowa, 566; *State v. Westfall*, 49 Iowa, 328; *Lynes v. State*, 36 Miss. 617; *State v. Duncan*, 64 Mo. 262; *Strady v. State*, 5 Cold. 300; *People v. Moore*, 45 Cal. 19; *People v. English*, 52 Cal. 212; *People v. Aleck*, 61 Cal. 137. The admission of the evidence complained of was prejudicial error, and for these reasons the judgment is reversed, and the cause remanded, with instructions to sustain the demurrer, and for such other proceedings as may be necessary, not inconsistent with this opinion.

REVERSED.

Decided at PENDLETON, 13 August, 1886.

SPROUL v. WESTERN ASSURANCE CO.

[54 Pac. 180]

1. **AGREEMENT TO INSURE—PRESUMPTION AS TO FORM OF POLICY.**—Where nothing is stipulated in a preliminary agreement to insure so far as it respects the kind of policy to be issued, the law presumes that the parties contemplated the policy ordinarily employed by the company to cover property of the kind designated in the agreement, and this whether insured sues in equity for specific performance of the agreement and for damages in pursuance thereof, or at law directly on the agreement for damages for a breach thereof in neglecting to issue the policy.
2. **INCUMBRANCES—WAIVER OF CONDITIONS OF POLICY.**—Where, in the course of the negotiation of a preliminary agreement for the issuance of a policy, no inquiry is made touching incumbrances, and no intimation is given applicant that they would affect the insurance, the denial of the agreement and the withholding of the policy by the company waives a condition in the policy

NOTE.—The validity of oral contracts of insurance is considered, with a collection of the authorities, in the following annotated cases: *Ruggles v. American Ins. Co.*, (N. Y.) 11 Am. St. Rep. 674; *Long v. North British Ins. Co.*, (Pa.) 21 Am. St. Rep. 879; *Croft v. Hanover Ins. Co.*, (W. Va.) 52 Am. St. Rep. 902; *Newark Machine Co. v. Kenton Ins. Co.*, (Ohio) 22 L. R. A. 760.—REPORTER.

against incumbrances: *Koshland v. Home Ins. Co.*, 31 Or. 321, and *Koshland v. Hartford Ins. Co.*, 31 Or. 402, applied.

3. WAIVER OF PROOFS OF LOSS.—A denial of an oral contract to insure followed by a refusal to deliver a policy, is a waiver of any condition or rule requiring proofs of loss: *Hardwick v. State Ins. Co.*, 20 Or. at p. 557, applied.

From Umatilla: STEPHEN A. LOWELL, Judge.

Action by Thomas J. Sproul against the Western Assurance Company. From a judgment in favor of plaintiff, defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Balleray & Hailey*, with an oral argument by *Mr. John J. Balleray*.

For respondent there was a brief over the names of *Carter & Raley*, with an oral argument by *Mr. Raley*.

MR. JUSTICE WOLVERTON delivered the opinion.

This is an action on an alleged oral preliminary contract for insurance. The complaint, after showing the ownership of the property and its value, states, in brief, that on August 20, 1896, while plaintiff was such owner, defendant by verbal contract insured the property against loss or damage by fire in the sum of \$850 for a period of two months, in consideration of a premium of \$12.75; that by the terms of the agreement defendant undertook to write up and deliver to plaintiff a policy of insurance covering said property within a reasonable time, upon the delivery of which plaintiff was to pay the stipulated premium; that a portion of said property was afterwards consumed by fire and plaintiff's damages under the contract were \$650, for which amount he prays judgment. A tender of the premium and a demand for the policy on the part of the plaintiff and a

refusal by the defendant is averred, as is also proof of loss and a compliance in all other respects by plaintiff with the terms of said contract. The defendant controverts all the material allegations of the complaint except those touching the making and furnishing proof of loss; and for a further and separate defense alleges, in substance, that whatever verbal contract or agreement, if any, was made or entered into between plaintiff and defendant, its provisions contemplated the issuance by the defendant to plaintiff of one of its regular printed forms of policies usually employed by it to cover property of the nature alleged to have been the subject of insurance, which if issued would have contained a condition that said policy, unless otherwise provided by agreement indorsed thereon or added thereto, should be void if the subject of insurance be personal property and be or become incumbered by chattel mortgage, and that in violation of such condition the property was so incumbered during all the times stated in the complaint, and that the existence of such incumbrance was unknown to the defendant or its agents, and that no agreement was made or entered into consenting to said incumbrance. The reply denies that such a condition constituted any part of the verbal contract or agreement, and sets up matter intended to operate as a waiver by defendant of the alleged condition.

At the trial the court instructed the jury, among other things, that the defendant company could claim no exemption from liability on account of any provision the policy might or would have contained if it had been issued, and refused an instruction asked for to the effect that if the jury should find from the evidence that nothing was said by plaintiff or the defendant's agent at the time the alleged verbal agreement was entered into concerning the kind of written policy which was in contem-

plation by the parties, the presumption would be that they had in mind the usual and ordinary policy then in use by the insurer by which it usually covered that species of property. The giving of the former and the refusal of the latter instruction form the basis for the principal assignment of error.

Two remedies seem to have grown up and are now well established by authority for redress upon a preliminary oral contract for insurance of the nature of the one here involved. One is in equity, to require a specific performance of the agreement to issue the policy; and having acquired jurisdiction for that purpose the court will, in order to avoid a multiplicity of suits, administer full relief and decree a recovery for the amount of the loss sustained: *Baile v. St. Joseph Insurance Co.*, 73 Mo. 371; *Eames v. Home Insurance Co.*, 94 U. S. 621; *Commercial Mut. Insurance Co. v. Union Mut. Insurance Co.*, 60 U. S. (19 How.) 318; *Croft v. Hanover Insurance Co.*, 40 W. Va. 508 (52 Am. St. Rep. 902, 21 S. E. 854); *McCann v. Aetna Insurance Co.*, 3 Neb. 198; *Insurance Co. v. Colt*, 87 U. S. (20 Wall.) 560. The other by an action at law directly upon the oral or verbal agreement, and the relief administered will be damages measurable by the loss sustained to the property covered by reason of its injury or destruction by fire, under the terms, limitations and conditions of the agreement: *Campbell v. American Insurance Co.*, 73 Wis. 100 (40 N. W. 661); *Mobile Insurance Co. v. McMillan*, 31 Ala. 711; *Angell v. Hartford Insurance Co.*, 59 N. Y. 171 (17 Am. Rep. 322); *King v. Cox*, 63 Ark. 204 (37 S. W. 877); *Myers v. Liverpool Insurance Co.*, 121 Mass. 338.

The question involved here is whether, in an action upon the verbal agreement to insure, the policy which the insurer undertakes and agrees to issue shall be considered as a factor in any manner regulating or circum-

scribing the relief to be administered ; that is to say, whether the terms, conditions and limitations which the contemplated policy would contain, if issued in accord with the understanding of the parties, enter into, limit or control in any particular the preliminary agreement so as to affect the remedy. The authorities all agree that there is a distinction between a contract of insurance which comprehends the issued policy and a contract to insure. The one is executory in its nature, and the other executed. It is plain that, if a suit to compel specific performance is adopted, the policy is regarded as an indispensable element in determining the measure of the relief, because the remedy is eventually applied as if an action had been instituted directly upon the policy. The court treats the contract as executed, and gives relief upon it in that form. The effect of such a proceeding is to enforce the ultimate intendment of the parties, including the policy, stipulations and conditions ; for the remedy eventually proceeds as if the policy had been issued, and the suit was for the direct enforcement of its terms and conditions. So that the policy is, at least in an equitable sense, a component part of the preliminary contract. In the action at law damages are demandable for a breach of the preliminary agreement. The usual intendment of such an agreement is that a policy shall issue which shall contain the specific limitations and conditions upon which the loss insured against shall be payable. A failure or refusal to issue the policy constitutes the breach. The undertaking is to insure, and it is not a direct or absolute contract to pay the loss which may accrue to the insured by reason of destruction or injury by fire to the property designated, not exceeding the stipulated amount. Ordinarily, nothing is said in the preliminary arrangement touching what acts of omission or commission, if any, will nullify or avoid the undertaking to pay

the fire loss, or what conditions, if any, shall be observed by him to preserve and perfect his right of action looking to a recovery for such loss. All these are matters of detail, which the preliminary conditions contemplate shall be prescribed by the policy contracted for. But the insurance is effected by the policy the issuance of which constitutes the ultimate act contemplated by the executory, and completes the executed, contract. Now, by what measure shall damages be meted? Shall it be as if the contract effectuated absolute insurance of the property to the amount of the stipulated sum, payable unconditionally in case of destruction or injury by fire without limitation or condition, or shall it be as the contemplated policy would have prescribed if issued and accepted by the parties? Mr. Wood, in his work on Insurance (§ 11), says: "The distinction between a contract of insurance and a contract to insure is that the one is executed, and the other executory, and in the one case the action is upon the contract for the loss or damage sustained under the risk, while in the other the action is for a breach of the contract for not insuring, and the measure of the recovery is the loss sustained, so that the effect is the same in either case." The principle upon which the authorities proceed and the ultimate conclusions at which they have arrived are in harmony with this doctrine.

1. We agree with counsel that where nothing is stipulated in the preliminary agreement as it respects the kind or nature of the policy to be issued, the law presumes the parties contemplated the usual and ordinary policy employed by the company to cover property of like kind and nature as that designated in the agreement. The authorities are numerous and uniform to this effect. We will refer to some of them. In *Eureka Insurance Co.*

v. *Robinson*, 56 Pa. St. 256 (94 Am. Dec. 65) the agreement was evidenced by a memorandum entered in the company's marine docket as follows: "No. 6,570. 1865, June 23d. Wm. H. Churchill, for account, etc., (on) steamboat River Queen, \$6,000. Total insurance, inclusive, \$12,000, against fire only, while finishing at the wharf at Pittsburg, Pa., (rate) $\frac{1}{4}$ per cent. per mo., from June 23d, 1865." Subsequently the following entry was made: "August 1st, 1865. Loss, if any, payable to Robinson, Rea & Co., for benefit of creditors." "Burned Sept. 10th, 1865." The court, speaking through STRONG, J., says: "There having been no policy issued, and nothing more than the memorandum above quoted entered upon the docket of the insurers, the contract is to be regarded as made upon the terms and subject to the conditions contained in the ordinary form of policies used by the company at the time. Whether the contract in this case was one of marine insurance or of fire insurance, it is not necessary at this stage of our remarks to determine. The company was authorized to issue policies of both descriptions, and, alike in the customary forms of both, it was made the duty of an assured to notify the insurers of any insurance subsequently obtained elsewhere, on penalty of forfeiting all right to recover against this company. In fire policies such notice was required to be given with reasonable diligence, and indorsed upon the policy or otherwise acknowledged in writing by the company. In marine policies the form required the notice to be given at the office of the company, and that the same be approved and indorsed upon the policy by the secretary or other authorized officer of the company. As the defendants in fact issued no policy in either form in this case, literal compliance with the conditions was impossible. But it was doubtless incumbent upon the plaintiffs to show either that notice of

the subsequent insurance in the Monongahela Insurance Company was given, or that these defendants had in some way dispensed with it." It was, however, subsequently determined that the contract was one concerning fire and not marine insurance, and that, although the memorandum was entered in the marine docket, the nature of the risk determined the nature of the policy contemplated by the parties. The case is instructive and much to the point in the present controversy, as the measure of the loss or damages would have been different, owing to salvage conditions under the marine policy, from that provided for under the usual fire policy.

In *Barre v. Council Bluffs Insurance Co.*, 76 Iowa, 609, (41 N. W. 373), BECK, C. J., says: "While the action is not upon the policy of insurance, it cannot be doubted that defendant's liability must be determined by the terms and conditions of the policy, which also must determine the plaintiff's measure of damages in case he recovers. The action is on an agreement to issue a policy. Now, it is plain that plaintiff's damages are just what he would have recovered if the policy had been issued and the suit brought thereon. It is also plain that defendant undertook to issue a policy in the usual form of its policies covering like risks. The law will presume that the minds of the contracting parties met upon a contract containing the terms and conditions of the policy usually issued by defendant covering like risks." In *Eames v. Home Insurance Co.* (94 U. S. 621), Mr. Justice BRADLEY says concerning the contract to insure: "It is sufficient if one party proposes to be insured, and the other party agrees to insure, and the subject, the period, the amount and the rate of insurance are ascertained or understood, and the premium paid if demanded. It will be presumed that they contemplate such form of policy, containing such conditions and limitations as are usual in

such cases, or have been used before between the parties. This is the sense and reason of the thing, and any contrary requirement should be expressly notified to the party to be affected by it." So, it is maintained that the relief is the same whether action is brought upon the contract or the policy. In *Firemen's Insurance Co. v. Kuessner*, 164 Ill. 275 (45 N. E. 540), the court say: "A suit to enforce the liability of an insurance company may be brought on the contract for insurance as well as upon the policy. The real cause of action is the same in both the contract and policy. The measure of damages recoverable is the same, and the policy must be based on the contract of insurance, and can contain no element different therefrom."

It has also been held, as before stated, that the relief is the same whether it is sought in equity to enforce specific performance and a decree for damages in pursuance thereof, or at law directly upon the contract for recovery of damages for a breach thereof in neglecting or refusing to issue the policy: *Nebraska Insurance Co. v. Seivers*, 27 Neb. 540 (43 N. W. 351); *Gold v. Sun Insurance Co.*, 73 Cal. 217 (14 Pac. 786). Turn the proposition, therefore, whichever way we may, the policy itself, which is in the mind of the parties when the preliminary agreement is entered into,—the one in form which it is usual for the company to issue covering like property, unless otherwise stipulated,—becomes a controlling factor in determining the relief to which the assured is entitled. In further support of these various propositions, see *Van Loan v. Farmers' Insurance Association*, 90 N. Y. 280; *Home Insurance Co. v. Favorite*, 46 Ill. 263; *Hubbard v. Hartford Insurance Co.*, 33 Iowa, 325 (19 Am. Rep. 305); *Smith v. State Insurance Co.*, 64 Iowa, 716 (21 N. W. 145); *State Insurance Co. v. Porter*, 3 Grant, Cas. 123; *Newark Machine Co. v. Kenton Insurance Co.*,

50 Ohio St. 549 (22 L. R. A. 768, 35 N. E. 1060); *Salisbury v. Hekla Insurance Co.*, 32 Minn. 458 (21 N. W. 552); *De Grove v. Metropolitan Insurance Co.*, 61 N. Y. 594 (19 Am. Rep. 305); *Lipman v. Niagara Insurance Co.*, 121 N. Y. 454 (8 L. R. A. 719, 24 N. E. 699); *Fuller v. Madison Insurance Co.*, 36 Wis. 603. It is clearly manifest from these authorities, against which we find no counter-vailing opinions, that the court below was in error both upon the instruction given and the one requested, but refused, and for this reason a new trial must be had.

2. There was another question, however, presented to the court below by a requested instruction, and rightly ruled, the consideration of which may serve to define more clearly the nature of the relief obtainable by an action upon the contract or agreement to insure. The plaintiff replied to the defense that the property was incumbered with a chattel mortgage, at the time the contract was entered into, which would have voided the policy if issued, by stating that defendant's agent made no inquiry touching any incumbrance, and did not inform plaintiff that the existence of such a condition would in any manner affect the insurance, and, therefore, that the company waived the condition against incumbrances which would have been contained in the contemplated policy. The court was asked, but refused, to instruct that if the existence of such chattel mortgage was unknown to the defendant or its agents, and no agreement made or entered into consenting to said mortgage, then that said policy would, if issued, be void. Where, in the course of the formulation of the preliminary agreement, no inquiry is made touching incumbrances, and no intimation is given that they would in any way affect the insurance stipulated for, and the contract is denied, and the policy withheld, we think it operates as a waiver

of the condition in the policy voiding it because of such incumbrances. We held in *Koshland v. Home Insurance Co.*, 31 Or. 321 (49 Pac. 864), that, where the policy is issued with the knowledge on the part of the agent that the property was incumbered by mortgage, the condition was waived so that it could not afterwards be insisted upon by the company. In *Nichols v. Fayette Insurance Co.*, 1 Allen, 63, where the assured disclosed the fact that an incumbrance existed, but failed to state the amount, it was held that the issuance of the policy, with the limited knowledge thus acquired, was a waiver of the condition against incumbrances. In the case of *Geib v. Enterprise Co.*, found reported as a note to *Geib v. International Insurance Co.*, 1 Dill. 449, (Fed. Cas. No. 5,298), the defendant's agent had procured from the plaintiff, a German unable to read, an application for insurance, which was not read to him, but was represented to be all right, no inquiries whatever having been made of him respecting incumbrances, and it was held that the acts of such agent constituted a waiver on the part of the company of the plaintiff's duty to disclose the existence of an incumbrance upon the property covered. To the same purpose see *Klein v. Union Insurance Co.*, 3 Ont. 234, 261. We also held in *Koshland v. Hartford Insurance Co.*, 31 Or. 402 (49 Pac. 866), that a failure on the part of the assured to disclose an incumbrance, when no inquiry is made on the part of the company's agent concerning such matters, was not violative of the provisions of the policy that it should be void if the insured concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance or the subject thereof, or if the interest of the insured in the property be not truly stated.

Now, where the policy contains stipulations voiding it on account of certain conditions existing at the time of

its issuance, such as incumbrances upon the property, other insurance, and the like, the assured cannot be presumed to have become apprised of them unless some intimation thereof has been conveyed to him by inquiry touching the subject matter of such conditions, or other distinct notice that they would be insisted upon, or unless the policy has been issued to him that he may be advised of its exact terms in the premises. For this reason, where the existence of a contract to insure is flatly denied, and the issuance of the policy is refused and withheld, the company should be held to have waived such conditions as are calculated to void it at the very moment of its execution, unless it has given ample notice to the assured that they will not only be contained in the policy, but insisted upon, in case the facts which are supposed to give rise to the stipulations prove to be falsely represented.

3. So it is as it respects those conditions which the assured is required to observe in order to perfect his remedy against the company. A withholding of the policy, and a denial of the right to its issuance, will waive the conditions touching proof of loss: *Tayloe v. Merchant's Insurance Co.*, 50 U. S. (9 How.), 390; *Gold v. Sun Insurance Co.*, 73 Cal. 217 (14 Pac. 786); *Baile v. St. Joseph Insurance Co.*, 73 Mo. 371; and *Campbell v. American Insurance Co.*, 73 Wis. 100 (40 N. W. 661). And in *Hardwick v. State Insurance Co.*, 20 Or. 547-557 (26 Pac. 840), it was held that such an act precluded the company from insisting upon the stipulated limitation of the action to enforce payment. But the assured, under the authorities, is held accountable under all conditions of the contemplated policy which are calculated to protect the company against subsequent increase of hazard without its consent, in the prescribed manner, if it is possible, without the physical existence of the instrument itself, to comply

therewith: *Eureka Insurance Co. v. Robinson*, 56 Pa. St. 256 (94 Am. Dec. 65). Reversed and remanded.

REVERSED.

Decided at PENDLETON, 18 August, 1898.

STATE v. BARTMESS.

[54 Pac. 167]

1. **IMPEACHING ONE'S OWN WITNESS—EVIDENCE.**—Where a witness gives testimony which is unexpected, the court may, in its discretion, permit the party calling him to direct the attention of the witness to circumstances of time, place, and persons present, to refresh his memory as to alleged contradictory statements; and where such witness answers in an equivocal manner, and seemingly tries to shade his testimony to the advantage of the other party, such statements made by him at another time may be given, not as substantive proof, but by way of explanation. *Langford v. Jones*, 18 Or. 308, and *State v. Steeves*, 20 Or. 85, followed.
2. **IMPEACHING QUESTION—PERSONS PRESENT.**—Where it is desired to lay a foundation for impeaching a witness by contradictory statements theretofore made, it is not necessary to name all the persons who were present. It will be sufficient to designate a few of them, especially where the contradictory statements were made in public, and then anyone who heard them may testify.
3. **REFRESHING MEMORY FROM MEMORANDA—WITNESS.**—Stenographic notes made at a preliminary examination may be used to refresh the memory of the person who made them to contradict the testimony of a witness, where a proper foundation therefor has been laid.
4. **COMPETENT EVIDENCE OF SITUATION.**—On a trial for murder evidence is admissible to the effect that the tracks of the deceased occurred at regular intervals to the point where he fell, although there were many tracks around the body, but none other in the furrow where the deceased was walking, as bearing on the question whether the deceased made any hostile advances on defendant.
5. **DEFENDANT AS WITNESS—CROSS-EXAMINATION—IMPEACHMENT.**—The defendant in a criminal action who voluntarily testifies in his own behalf may be cross-examined as to statements made on his preliminary examination contrary to his testimony on the trial, although he did not in his direct examination refer to the preliminary examination. *State v. Abrams*, 11 Or. 100, followed; *State v. Lurch*, 12 Or. 99, and *State v. Saunders*, 14 Or. 300, distinguished.
6. **APPEAL—UNANSWERED QUESTION.**—Alleged error in excluding an answer to a question is not available on appeal unless the bill of exceptions shows that counsel stated what he expected the answer to be. *Stanley v. Smith*, 15 Or. 505; *State v. Gallo*, 18 Or. 423, and *Craft v. Dalles City*, 21 Or. 53, followed.
7. **INSTRUCTIONS MUST BE TAKEN TOGETHER—TRIAL.**—A judgment will not be reversed because some instruction considered alone may be subject to criticism where the instructions as a whole are substantially correct and could not have prejudicially misled the jury. *State v. Anderson*, 10 Or. 448, and *State v. Hansen*, 25 Or. 391, applied.

38	110
136	586
38	110
206	209
206	215
38	110
37	97
38	306

38	110
41	443
38	110
43	187
43	390
43	453

8. EVIDENCE OF THREATS—SELF-DEFENSE.—An instruction on a trial for murder that evidence of threats by the deceased or a previous quarrel may be considered by the jury if the circumstances raise a doubt as to whether defendant acted in self-defense in order to aid them in determining who was the aggressor is not prejudicial to defendant where he is convicted of manslaughter only, and if the jury had not considered such evidence the verdict must have been a finding that defendant was guilty of murder in the first or second degree.
9. FORCE TO EXPEL TRESPASSERS—HOMICIDE.—The right within a reasonable time to employ sufficient force to expel a person who unlawfully intrudes on one's premises after having been warned to depart does not extend beyond the limits of the dwelling and the customary outbuildings.
10. INSTRUCTION ON USE OF DEADLY WEAPON.—An instruction that "an intent to murder is conclusively presumed from the deliberate use of a deadly weapon, causing death within a year, if not done in self-defense or in the rightful and necessary defense of property," is cured by a modification to the effect that "this does not raise a presumption of murder in the first degree; it only uses the term 'murder,' and cannot raise a presumption greater than murder in the second degree." *State v. Carver*, 22 Or. 602, cited.

From Union: ROBERT EAKIN, Judge.

George W. Bartmess was convicted of manslaughter and appeals.

AFFIRMED.

For appellant there was a brief over the names of *Thos. H. Crawford, Baker & Baker* and *J. W. Knowles*, with an oral argument by *Messrs. Crawford and J. F. Baker*.

For the state there was a brief and an oral argument by *Messrs. Hugh F. Courtney*, district attorney, and *James A. Fee*.

MR. JUSTICE MOORE delivered the opinion.

George W. Bartmess was indicted for the crime of murder in the first degree, alleged to have been committed in the killing of one Henry Sidal, and, having been tried therefor, was convicted of manslaughter, and sentenced to imprisonment in the penitentiary for a term of ten years. From this judgment he appeals, assigning

as error the action of the trial court in admitting and rejecting testimony, and in giving and refusing certain instructions.

It is contended by defendant's counsel that the court erred in permitting the state to cross-examine its own witness, and attempt to impeach him upon an immaterial matter. To render the exception intelligible, it is deemed expedient to detail the circumstances which led up to the homicide: The testimony tends to show that defendant having leased to deceased and one Henry Ruhnstroth a tract of land for farming purposes, a controversy arose between him and them as to the right of possession of a garden; that on April 25, 1897, Sidal drove to the garden with a plow in his wagon and attempted to pass through a gate which Bartmess was trying to hold in position, so as to prevent him from entering and plowing the garden, but Sidal pushed the obstruction down, took the plow from the wagon and threw it on the gate over which he stepped and pursued Bartmess a short distance towards the latter's house, about one hundred yards off, to which he fled through an opening in the fence. Sidal thereupon hitched his team to the plow, and commencing at an opening in the fence near the southeast corner of the garden plowed once around the lot. In the meantime Bartmess, having obtained a Winchester rifle at the house, returned to a gate on the east side of the garden as Sidal was plowing the second furrow around the north end of the lot, and fired over his head. As Sidal reached the southeast corner of the garden, completing the second furrow, he was shot by Bartmess, the bullet entering the left side at a point above the hip, passing to the right and a little downward, severing the left common iliac artery and lodging in the fifth lumbar vertebra, from the effect of which he died in a very few minutes. The state insists

that he was instantly killed in his tracks as he followed the plow, while Bartmess says he was shot as he was approaching him in a threatening manner. Bartmess testified, in substance, that, after he fired the first shot he passed through the garden gate and went towards the southeast corner of the lot, towards which Sidal was plowing; that as the latter reached the gap in the fence he told him to drive out, and upon his refusal he repeated the command, whereupon Sidal threw the lines from his shoulder, passed around the horses and came seven or eight feet towards him; that he twice told him to stand back, but seeing him still approaching and fearing that his life was in danger he, without taking aim, fired the gun at a distance of twelve or thirteen feet from Sidal, who, being hit, placed his hands to his side, went backward about eleven feet, turned around and lay down.

1. Henry Ruhnstroth, a witness for the state, testified that, when Sidal threw the plow on the gate, he followed Bartmess several steps towards the latter's house; and, the question being asked as to how many steps were taken, he replied: "I couldn't say exactly; maybe three or four, something like that." The attention of the witness having been called to the circumstances of time, place and persons present, he was asked if he did not, at Bartmess' preliminary examination, in answer to the question, "How far did Sidal run after Bartmess?" say, "It was a couple of steps." Counsel for defendant objected to the question, for the reasons hereinafter stated; but the objection being overruled, and an exception allowed, the witness answered: "Yes, I may have. I said either several or a couple; I don't know exactly." The witness was also asked if Bartmess ever told him why he killed Sidal, to which he replied: "Well, when

I first saw Bartmess, he said he shot him ; that he wouldn't have done it, but he was afraid ; he was coming towards him, and he told him he was going to kill him." The attention of the witness having again been called to the circumstances of time, place and persons present, he was asked if he had not said that Bartmess told him a number of times that he would not have killed Sidal for plowing in the garden if it were not that he had the quarrel at the gate. The same objection having been interposed as in the preceding preliminary question, counsel for the state informed the court that the testimony of the witness had taken them by surprise ; whereupon the objection was overruled, an exception allowed, and the witness answered : " I guess I remember. I said I expect he never would have killed the man if it wasn't for the quarrel." The state, over defendant's objection and exception, called W. B. Sargent, who was not named as one of the persons present in the preliminary question propounded to Ruhnstroth, and one Hindman, who both testified that Ruhnstroth used the language as claimed by the prosecution. Counsel for the state, having called Ruhnstroth to the stand as a witness, thereby represented him as not wholly unworthy of credit, for which reason they could not attack his general reputation for veracity ; but, having stated to the court that they had been surprised by his unexpected testimony, it was within the sound discretion of the court to permit them to call the attention of the witness to the circumstances of time, place, and persons present, in order that they might refresh his memory ; but having answered in an equivocal manner, and seemingly tried to shade his testimony to defendant's advantage, no error was committed in allowing his contradictory statements, made at another time, to be offered in evidence, not as substantive proof, but by way of explanation only. Hill's Ann.

Laws, § 838; *Langford v. Jones*, 18 Or. 307 (22 Pac. 1064); *State v. Steeves*, 29 Or. 85 (43 Pac. 949); *Campbell v. State*, 23 Ala. 44; *People v. Jacobs*, 49 Cal. 384.

It is insisted that if Ruhnstroth testified at the preliminary examination that Sidal ran after Bartmess "a couple of steps," and at the trial that he followed him "several steps," or even "three or four steps," there is no material contradiction in the statements, and hence the court erred in admitting evidence of his former testimony. The defendant sought to excuse the homicide on the ground of self-defense, and, in support of his theory, tried to make it appear that, when he fired the fatal shot, he had reason to believe, and did believe, that deceased was about to take his life, or to inflict upon him some great bodily injury. The correct distance Sidal pursued Bartmess was therefore very material in tending to show the reasonableness of the latter's apprehension of violence, and also to illustrate the degree of the former's turbulence and vindictiveness. True, there is not much apparent difference between a "couple of steps" and a "few steps"; but the manner of stating these facts might be such as to impress the trial court that the witness intended to attach much more importance to the latter phrase than the use of the words employed would seem to indicate; and, since the tone and bearing of a witness cannot be incorporated into the bill of exceptions, the trial court was much better able to determine the question than this court can possibly be from an inspection of the record, in view of which we are not prepared to say that its discretion was abused in admitting the contradictory evidence objected to. It having been charged in the indictment that Bartmess purposely, and of deliberate and premeditated malice, killed Sidal, the defendant's plea of not guilty rendered material any evidence tending to prove that issue. If Bartmess said he

would not have killed Sidal for plowing in the garden if it were not that they had the quarrel at the gate, the declaration would have been against his interest, and evidence thereof would have tended to show premeditation and deliberation. The prosecuting attorney, expecting to be able to prove this admission by Ruhnstroth, called him to the stand, and requested him to state whether Bartmess ever told him why he killed Sidal, to which he replied : " Well, when I first saw Bartmess, he says he shot him. He wouldn't have done it but he was afraid. He was coming towards him, and he told him he was going to kill him." This testimony tended to prove defendant's theory of the homicide, and, having been produced by the state, was binding upon it, unless its effect could be avoided by stating to the court that a mistake had been made in calling the witness, in proof of which his attention was called to the circumstances of time, place, and persons present, and the statement which was imputed to him, detailed with particularity, in order that his memory might be refreshed ; and, upon inquiring if he made the statement, the witness replied : " I guess I remember. I said I expect he never would have killed the man if it wasn't for the quarrel." It will be observed that the witness qualifies the statement imputed to him by making it his own, instead of acknowledging that it was Bartmess' declaration ; and this being so, and the alleged admission being material, the mistake made in calling the witness was excused by producing other witnesses to prove that Ruhnstroth made, in their presence, the statement upon the faith of which the state relied.

2. It is insisted that, Sargent's name not having been included in the preliminary question propounded to Ruhnstroth, the court erred in permitting him to be called to

prove the statement claimed to have been made by the latter. The testimony of a witness given at a trial, or at the preliminary examination of a person charged with the commission of a felony, cannot be regarded as a statement made to any particular individual; and, when the attention of the witness is directed to the circumstances of time, place and a few of the persons present, the opportunity to refresh the memory is afforded, in view of which any person present, though not named in the preliminary question except as "other persons," must be competent to detail the testimony given. Before a witness can be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony, a foundation therefor must be laid, by calling his attention to the circumstances of time, place and persons present: Hill's Ann. Laws, § 841. It cannot be supposed that this statute is to be literally construed, or that a witness is entitled to a recital of the names of all persons present before evidence of his contradictory statements can be received; for, if that were the rule, an omission of a single name would render the testimony of any person so named inadmissible. It is admitted that the person to whom the contradictory statement was made should be named in the preliminary question propounded for the purpose of laying a foundation for impeachment (*Sheppard v. Yocum*, 10 Or. 402); but the reason for this rule fails when the statement consists of testimony given at a preliminary examination, or at a public trial; and, such being the case, no error was committed in permitting Sargent to testify in relation to Ruhnstroth's evidence.

3. This witness took private stenographic notes of the testimony given at the preliminary examination, a part of which he transcribed and used at the trial, in order to

refresh his memory ; and in answer to an interrogatory concerning the impeaching question propounded to Ruhnstroth, as to whether he had not said that Sidal ran after Bartmess a couple of steps, he replied : " I would say that the question wasn't asked in that particular shape. It is in substance the same. He did, according to the notes." Defendant's counsel thereupon moved to strike out his answer, because it was not the witness' recollection of what he said ; but, the motion being denied, the witness added : " I said ' according to the notes,' but from my recollection he made that statement." While the minutes of the testimony given by a witness on a preliminary examination cannot be offered in evidence at the trial of the defendant to impeach such witness, because he did not sign the memorandum, the notes may, nevertheless, be used to refresh the memory of the person who made them, in order that he may contradict the testimony of the witness, if a proper foundation therefor has been laid : 29 Am. & Eng. Enc. Law (1st ed.), 792 ; *State v. Hayden*, 45 Iowa, 11 ; *State v. Adams*, 78 Iowa, 292 (43 N. W. 292) ; *Sanders v. State*, 105 Ala. 4 (16 South. 935). Sargent's memory having been refreshed by an examination of his notes, no error was committed in permitting him to testify in the manner indicated.

4. The state, claiming that Sidal was shot and fell in his tracks as he followed the plow, sought to establish its theory, and prove the degree of the homicide, by expert testimony tending to show that the wound inflicted must have produced instant death ; that the location of the wound and the track of the bullet indicate the position which Bartmess must have occupied when he fired the shot ; and that Sidal's tracks in the furrow occurred at regular intervals up to the point where he fell, thus showing, as it is claimed, that he could not have left the

plow to go around the horses, and hence made no hostile demonstrations towards Bartmess. The testimony of the state's witnesses tended to prove that Sidal's tracks could be traced to the point where he fell, the right foot remaining in its last imprint, while the last track of the left foot indicated that it had been dragged a short way, and that this foot was found to be drawn up under the body. It is contended by defendant's counsel that the evidence of other witnesses conclusively shows that all the witnesses for the state who testified concerning the condition of the ground immediately around the place where Sidal's body lay came to the scene long after the arrival of others who prior thereto had made so many tracks surrounding the body that it was impossible for the witnesses to identify Sidal's tracks; and, such being the case, the court erred in permitting these witnesses, over objection and exception, to testify concerning the matter. The testimony of George Harmon, which is objected to for this reason, fairly illustrates the testimony of other witnesses, and shows that he saw dim tracks in the furrow leading up to where the body lay; that there were a good many tracks leading from the body towards the garden gate, and many tracks around the head of the body, but he did not notice any tracks leading from the feet. If the testimony of this and other witnesses was to be believed, it tended to show that Sidal made the tracks in the furrow; and, this being so, the court committed no error in admitting the testimony, and submitting the question to the jury for their determination.

5. The defendant, on direct examination in his own behalf, testified, in substance, that at the time of the difficulty at the gate, Sidal must have followed him about eight or ten feet; that, as he shot, he thought he saw a whip, stick, or something fall from Sidal's hand;

that, from Sidal's size and general appearance, his observation of him, his threats directly made or communicated to him, and his conduct at the gate, he believed him to be a violent and brutal man when in anger, and thought that, unless he shot the deceased, he would be killed by him; and that, after he fired the fatal shot, Sidal went back about eleven feet. On cross-examination he also said that Sidal followed him from the gate about twelve or thirteen feet, whereupon he was asked to state what he said at the preliminary examination as to how far he was followed, to which he replied: "I don't just recollect what I said, exactly the distance." He was also asked if he had not there said, in the presence of certain persons, that Sidal chased him six or eight feet, to which he replied: "I think it was further than that. I couldn't say positively. I think I said about ten feet." The defendant was further cross-examined in relation to such distance, the menacing language and conduct of Sidal, his possession of a whip just before the shooting, the movements of both immediately after, and in regard to his testimony at the preliminary examination; whereupon the state, after laying the usual foundation therefor, undertook to show by Sargent that the defendant made statements before the committing magistrate inconsistent with the testimony elicited on such cross-examination. All this testimony having been admitted, subject to objection and exception, defendant's counsel contend that the pretended cross-examination of Bartmess did not relate and was not germane to any testimony given by him on his direct examination, in which he never alluded to the preliminary examination, or referred to any testimony given by him thereat; and, such being the case, the prosecuting attorney was precluded from cross-examining the defendant in relation to any

testimony he may have given before the committing magistrate.

The organic law of the state declares that no person shall be compelled in any criminal prosecution to testify against himself: Const. Or. art. I, § 12. The statute, however, which permits a defendant in a criminal action to testify in his own behalf reads as follows: "In the trial of or examination upon all indictments, complaints, information, and other proceedings before any court, magistrate, jury, grand jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person so charged or accused shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court, or to the discrimination of the magistrate, grand jury or other tribunal before which such testimony may be given; *provided*, his waiver of said right shall not create any presumption against him; that such defendant or accused when offering his testimony as a witness in his own behalf, shall be deemed to have given to the prosecution a right to cross-examination upon all facts to which he has testified, tending to his conviction or acquittal": Hill's Ann. Laws, § 1365.

The views of this court on the latter clause of said section were clearly illustrated in *State v. Lurch*, 12 Or. 99, (6 Pac. 408), and *State v. Saunders*, 14 Or. 300, (12 Pac. 441), wherein the judgments were reversed because the trial court permitted the cross-examination of the defendant to extend beyond the facts testified to by him as a witness in his own behalf. To the same effect, see *People v. O'Brien*, 66 Cal. 602, (6 Pac. 695).

But in *State v. Abrams*, 11 Or. 169, (8 Pac. 327), the defendant, being on trial for murder in the first degree, testified as to what occurred at the meeting which resulted

in the homicide. Upon cross-examination, counsel for the state, over his objection and exception, were permitted to call his attention to the circumstances of time, place and persons present; and he was asked if he had not made, at other times, statements inconsistent with the testimony given at the trial; but, the witness having denied that he had made such declarations, other witnesses were called, and permitted to testify to the effect that he had made the statements imputed to him. The defendant, having been convicted, appealed; and the court, in affirming the judgment, held that, when a defendant in a criminal action availed himself of the privileges which the statute (section 1365, *supra*) conferred, he subjected himself to the same rules of cross-examination as any other witness. The question is whether the rule announced in that case has been modified by the subsequent decisions hereinbefore mentioned, in neither of which is any reference made to the case of *State v. Abrams*. Mr. Chief Justice LORD, in a concurring opinion, says, in the case of *State v. Saunders*, 14 Or. 300: "The general rule in respect to any witness on cross-examination is that he may be cross-examined as to any facts and circumstances testified to by him on his direct examination; and, personally, I have been inclined to think that our statute was but a mere affirmation of this rule as to the accused, and that, when he voluntarily took the witness stand, he subjected himself to the same tests as are applied to any other witness, and, in the sound discretion of the trial court, may be cross-examined as to collateral facts calculated to test his credibility. But the question is debatable, and somewhat involved in doubt, and upon which there is some diversity of judicial utterances; and in such case I feel constrained to resolve my doubts *in favorem vitæ*."

And in *People v. Rozelle*, 78 Cal. 84, (20 Pac. 36,)

Mr. Justice WORKS, construing the California statute, and citing the case of *People v. O'Brien*, 66 Cal. 602, (6 Pac. 695) says: "The impression seems to prevail that the section quoted has the effect to confine the examination of a defendant to narrower limits than in the case of any other witness. We do not so understand it. He can only be cross-examined as to matters about which he was examined in chief. The rule is precisely the same as to any other witness. So far as other witnesses are concerned, however, the court is allowed some discretion as to the extent and scope of the cross-examination that might not be allowed in case of the defendant. But no such question arises here. It must be remembered, also, that the fact that a defendant offers himself as a witness as to a particular matter does not give the prosecution the right to make him a witness for the people, and examine him generally." To the same effect is the decision in the case of *State v. Porter*, 75 Mo. 171, under a similar statute, which is cited and relied upon by defendant's counsel. In *State v. Abrams*, 11 Or. 169 (8 Pac. 327) the language used is undoubtedly broader than is warranted by the cases of *State v. Lurch*, 12 Or. 99 (6 Pac. 408) and *State v. Saunders*, 14 Or. 300 (12 Pac. 441) which hold that a defendant in a criminal action cannot be cross-examined touching any other crimes he may have committed, unless he refers to such crimes in his direct examination, thus showing that he is not to be treated as a general witness to whom such questions may be propounded in the discretion of the trial court, for the purpose of testing his credibility. *State v. Bacon*, 13 Or. 143, (9 Pac. 333, 57 Am. Rep. 8).

The reason for this distinction is found in the fact that if the defendant could be treated as a general witness, and cross-examined as such, evidence of inculpatory acts tending to the commission of the crime with which he

was charged, and also of the commission of other crimes, might be brought before the jury, thereby causing them to lose sight of the real issue to be tried, and tending to the return of a verdict of guilty based upon evidence of particular acts wholly disconnected with the case on trial, in view of which the legislative assembly has wisely limited the rule of cross-examination, and confined it to the evidence given by the accused in his examination in chief. A fair construction of the statute in question leads us to conclude that defendant in a criminal action, having voluntarily testified in his own behalf, may be cross-examined in relation to all facts and matters germane to the testimony given by him on his examination in chief (*State v. Gallo*, 18 Or. 423, 23 Pac. 264); but, if he has made at other times statements which are inconsistent with the testimony given by him at his trial, he may be impeached by proof of such contradictory statements in the manner prescribed by statute, and the conclusion reached in *State v. Abrams* is adhered to in this respect. The condition of the defendant's memory, however, while it may affect his credibility, does not tend to prejudice him in the minds of the jurors, who, as men, must know that sickness, accidents, age, and many other causes impair this faculty of the human mind; and as the statute was designed to eliminate from a criminal trial, so far as the defendant's testimony is concerned, all matters of prejudice only, the right to cross-examine him in relation to the condition of his memory is not limited or restricted. Applying these rules to the case at bar, we think no error was committed by the admission of the testimony complained of.

6. Bartmess, on direct examination, was asked to state what acts of violence or brutality, if any, he had seen Sidal commit shortly prior to the homicide. The court

having sustained an objection to the question, defendant's counsel excepted to the ruling, but did not state what was expected to be proved by the answer to this question. In *Kelly v. Highfield*, 15 Or. 277 (14 Pac. 744), it was held that to make such an exception available, the bill of exceptions must show that counsel stated to the court what was expected to be proved by the witness' answer. To the same effect see, also, *Stanley v. Smith*, 15 Or. 505 (16 Pac. 174); *Tucker v. Constable*, 16 Or. 407 (19 Pac. 13); *State v. Gallo*, 18 Or. 423 (23 Pac. 264); *Craft v. Dalles City*, 21 Or. 53 (27 Pac. 163). This rule of practice has become thoroughly settled in this state by repeated adjudications upon the subject, in view of which if any error was committed by the trial court it is not made available by the bill of exceptions.

7. The court having given the following instruction : (16) "If you find that Bartmess was rightfully in the possession of the garden, and went to where Sidal was plowing only for the purpose of peaceably removing Sidal, and without any intention of using force or doing violence to him in accomplishing that purpose, and, while defendant was so peaceably attempting to remove Sidal from the garden, Sidal did make an attack upon him by overt acts or demonstrations of violence, and that such attack by Sidal did cause defendant, as a reasonable man, to fear death or great bodily harm at the hands of Sidal, and that such danger was imminent, then defendant would be justified in shooting Sidal, if necessary to save his own life or his person from great bodily harm," —defendant's counsel excepted thereto, and now maintain that the language used limits the right of self-defense to the actual existence of imminent danger to life and limb, and that the court erred in failing to state that such right depended upon defendant's belief only in the

apparent existence of such danger, based upon facts existing at the time. In the seventh, eighth, and tenth instructions the court correctly stated to the jury the circumstances which would tend to superinduce such a mental condition as would excuse a person in taking the life of another. In *State v. Hansen*, 25 Or. 391 (35 Pac. 976, and 36 Pac. 296), it is said: "Whenever the instructions, considered as a whole, are substantially correct, and could not have misled the jury to the prejudice of the defendant, the judgment will not be reversed because some instruction, considered alone, may be subject to criticism." To the same effect, see, also, 2 Thomp. Trials, § 2314; *State v. Anderson*, 10 Or. 448; *Territory v. Hart*, 7 Mont. 489 (17 Pac. 718); *Territory v. Jagers*, 9 Mont. 5 (22 Pac. 121); *People v. Doyell*, 48 Cal. 85; *People v. Welch*, 49 Cal. 174; *People v. Nelson*, 56 Cal. 77; *People v. Gray*, 61 Cal. 164 (44 Am. Rep. 549); *People v. Morine*, 61 Cal. 367; *People v. Hurtado*, 63 Cal. 288; *People v. McCurdy*, 68 Cal. 576 (10 Pac. 207); *People v. Kernaghan*, 72 Cal. 609 (14 Pac. 566); *People v. Clark*, 84 Cal. 573 (24 Pac. 313); *White v. Territory*, 1 Wash. St. 279 (24 Pac. 447). Tested by this rule, we think the court's charge, considered in its entirety, rendered the instruction complained of innocuous.

8. The court, referring to threats which it is claimed were made by deceased and communicated to defendant, and to the difficulty they had at the gate, also said to the jury: "And such threats or previous quarrel may be considered by you (if you find there were such) in case the circumstances of the case raise a doubt in regard to whether defendant acted in self-defense for the purpose of aiding you in determining who was the aggressor in the affray." An exception having been taken

to this instruction, it is insisted by the defendant's counsel that the effect of the language quoted is to change the burden of proof, thereby compelling defendant to establish his innocence, instead of requiring the state to prove its charge. When a homicide is sought to be excused on the ground of self-defense, evidence of threats made by deceased towards, and communicated to, defendant, and the latter's knowledge of his victim's dangerous and desperate character, are admissible as tending to prove that deceased was the aggressor, and to measure the reasonableness of defendant's apprehension of imminent danger. Whart. Cr. Ev. (9th ed.) § 757; *State v. Dodson*, 4 Or. 64; *State v. Porter*, 32 Or. 135 (49 Pac. 964); *Pritchett v. State*, 58 Am. Dec. 250; *Campbell v. People*, 61 Am. Dec. 49, and valuable note; *Keener v. State*, 63 Am. Dec. 269. But if it conclusively appear from circumstantial evidence, or from the undisputed testimony of witnesses to the killing, that defendant was the attacking party towards whom the deceased made no hostile demonstrations, evidence of threats made by the latter, or of his bad character, can be of no avail to excuse the homicide, for the command, "Thou shalt not kill," and the statutes which have been enacted to promote the divine injunction, serve to protect the life of a bad as well as that of a good man. Kerr, Hom. § 396; 2 Bish. New Cr. Proc. § 620; *People v. Garbutt*, 97 Am. Dec. 162; *Payne v. State*, 60 Ala. 80; *Holly v. State*, 55 Miss. 424; *State v. Morey*, 25 Or. 241, (35 Pac. 655, and 36 Pac. 573). The language used in the instruction complained of was probably founded upon a remark of Mr. Justice BLACK, in *State v. Downs*, 91 Mo. 19, (3 S. W. 219), in which he says: "Where the killing has been under such circumstances that there is doubt as to whether the act was done from malice or from a sense of real danger, testimony of the turbulent character of the

deceased may be received, and should be admitted, as tending to show and explain the motive that prompted the act."

It is the duty of the jury, in criminal actions, to resolve doubts in favor of the defendant, in view of which it must be admitted that the words adopted are not arranged in the best order to convey the court's idea of the law. Bartmess having testified that Sidal left the plow, and came towards him in a threatening attitude, rendered such testimony admissible, and its weight thereupon became a question for the jury to consider in connection with all the other evidence of the case; but, if they concluded therefrom that defendant was the aggressor, such evidence would be material only in aiding them to determine defendant's motive for the killing, and as a means for measuring the degree of his offense. The court, having admitted evidence of these threats and of the quarrel, told the jury, in effect, that it might be considered in connection with the circumstances of the case, such as the location of the wound, the track of the bullet, whether death was instantaneous, or deceased fell at the place he occupied when he was shot, etc., and that, if they were convinced beyond a reasonable doubt that defendant was the aggressor, the killing was inexcusable, in which case evidence of threats made by deceased, and communicated to defendant, and of their quarrel, would be unimportant in mitigation of the offense, and require no further consideration on that branch of the subject. It is very evident that the jury concluded that deceased was the aggressor, and hence considered the evidence in question. We are led to this conclusion from a consideration of the entire charge, and a belief that defendant was not prejudiced by the instruction complained of, for, had the jury failed to consider the evidence of such threats and quarrel, the verdict must inevitably have

been a finding that defendant was guilty of murder in the first or second degree.

9. It is contended that the court erred in refusing to give the following instructions requested by defendant : (3) "I instruct you that the defendant had a right to go out from the house to this garden, and order the deceased out of the garden ; and he had a right to take with him his gun if, in so doing, he acted in good faith, and took the gun thinking that this fact would cause the deceased to leave the garden more readily, or if he took the gun in good faith, for the purpose of protecting himself from being killed or receiving great bodily harm at the hands of the deceased ; and this is especially true if, from the character of the deceased, the former threats made by the deceased, and communicated to him, and the conduct of the deceased at the barn shortly before that, led him, as a reasonable man, to believe that the deceased was liable to attack him and kill him or do him great bodily injury." (6) "I further instruct you that a man has a right to arm himself for the purpose of defending himself against a felonious attack liable to cause his death or do him great bodily harm, where, from the character of the assailant and his former attitude towards the defendant, his previous threats, communicated and made to the defendant, lead the defendant, as a reasonable man, to believe, and he does honestly believe, that his assailant is liable to attack him and kill him or do him great bodily harm if the opportunity occurs." A man's house is regarded as his castle, to which he may flee for safety and protection, and which affords him and his family a "city of refuge" ; and, if a person unlawfully intrude, the householder, after having warned him to depart, if he do not obey within a reasonable time,

may employ sufficient force to expel him ; but the immunity pertaining to the defense of a habitation does not extend beyond the limits of the dwelling and the customary outbuildings : *Lee v. State*, 92 Ala. 15 (25 Am. St. Rep. 17, 9 South. 407). The instructions requested seem to carry the right of repelling force beyond the limits of defendant's curtilage, and to imply that he might resort to the use of arms to settle a controversy in relation to the right of possession, and to rid his premises of an intruder ; and, this being so, the instructions were properly refused when considered in the light of the sixteenth instruction given by the court, as hereinbefore quoted.

It is claimed that the court, in its charge, by the too frequent use of the phrase "and the defendant not being the aggressor," thereby seemed to emphasize and to call particular attention to this fact, to defendant's prejudice ; but an examination of the charge convinces us there was no error in this respect.

It is also claimed that the court erred in refusing to give to the jury the seventh and eighth instructions requested by the defendant ; but, without quoting them, it is sufficient to say that they were in effect given, as far as warranted by law, in the general charge, and hence no error was committed in refusing to repeat them.

10. It is contended that the court erred in instructing the jury that "an intent to murder is conclusively presumed from the deliberate use of a deadly weapon, causing death within a year, if not done in self-defense, or in the rightful and necessary defense of property" ; but thereafter this instruction was modified, the court saying : "This does not raise a presumption of murder in the first degree ; it only uses the term 'murder,' and cannot create a presumption greater than murder in the

Nov. 1897.] DAYTON v. BOARD OF EQUALIZATION. 131

second degree." So that any error of which defendant could complain was thereby corrected: *State v. Carver*, 22 Or. 602 (30 Pac. 315). And hence it follows that the judgment is affirmed.

AFFIRMED.

Argued 19 October; decided 22 November, 1897; rehearing denied.

DAYTON v. BOARD OF EQUALIZATION.

[50 Pac. 1000]

1. JURISDICTION OF STATE BOARD OF EQUALIZATION—RECORD.—The jurisdiction of the state board of equalization established by laws, 1891 (p. 182), pertains only to the equalization of the assessment of property to secure uniformity in valuations between the different counties of the state, and its functions are exercised in a summary manner. There are no parties to its proceedings, nor does it act *in rem*, and a record is not essential to the establishment of jurisdiction of person or thing. So far as county rolls are concerned the only record provided for is a tabulated statement of the abstracts of the county rolls, prepared by the secretary of the board. It is not necessary that the rolls themselves be before the board or even on file in the office of the secretary of state.
2. TAXATION—CHARACTER OF STATE BOARD.—The state board of equalization has revisory but not appellate powers, it is merely part of the machinery for equalizing taxes between the various counties: *California Land Co. v. Gowen*, 48 Fed. 772 (Or.) approved.
3. NATURE OF WRIT OF REVIEW.—Under section 585 of Hill's Ann. Laws a writ of review is substantially the common law remedy of *certiorari*; it is invoked to determine from an inspection of an entire record whether an inferior tribunal had the jurisdiction which it exercised, or whether it exceeded its jurisdiction, or whether its proceedings were regular: *California Land Co. v. Gowen*, 48 Fed. 772 (Or.), approved.
4. IRREGULARITY—COUNTY ROLLS.—It was merely a harmless irregularity that the board of equalization did not have before it the certified copy of the assessment roll of one county, where the record of the board shows that it acted upon an abstract of such county's roll, and that it actually equalized the assessments of such county, together with all the other counties.
5. IRREGULAR CLASSIFICATION—HARMLESS ERROR.—Although the statute (Hill's Ann. Laws, §§ 2770 and 2776) divides real property into only two classes for the purposes of taxation, viz., platted and rural land, it is not a fatal irregularity in the county assessment rolls if the former class is subdivided into "lots" and "improvements on lots." The state equalization board may properly add the two sets of values, making thereby a single class of the kind indicated by the statute, and then equalize it.
6. POWER OF STATE BOARD TO CORRECT COUNTY ASSESSMENTS.—The state board of equalization has no power to correct errors of county assessors or county boards of equalization, its functions are exercised entirely in adjusting the relative rights of counties.

33	181
33	206
34	242
34	246
33	181
35	298
33	181
38	604
38	181
40	470
33	181
44	61
44	84
33	181
46	242
33	181
48	86

7. POWER OF COURTS TO CORRECT ASSESSMENTS — REVIEW.— The courts cannot, upon a writ of review from the action of the state board of equalization, correct errors and irregularities of the assessors or county boards in making up their assessment rolls.
8. EQUALITY OF TAXATION REQUIRES UNIFORMITY OF CLASSIFICATION.—To enable the state board of equalization to secure proportional or uniform values among all the counties in the state, as contemplated by the Oregon statutes, there must be uniformity of classification; and the board has no authority to increase the assessment upon a particular class of personal property in one county where the assessment roll of another county does not recognize such particular class.

From Marion : HENRY H. HEWITT, Judge.

Proceeding in the form of a writ of review by the Dayton Hardware Co. against the State Board of Equalization and Multnomah County to test the propriety of the action of said board in adding twenty-five per cent. to the assessed valuation of plaintiff's stock of merchandise. There was a judgment for defendants.

REVERSED.

For appellant there was an oral argument by *Messrs. Edward Byers Watson and Joseph Simon.*

For respondents there was an oral argument by *Mr. Cicero Milton Idleman*, attorney-general, and *Thad. Stevens Potter*, deputy district attorney.

MR. JUSTICE WOLVERTON delivered the opinion.

The purpose of this proceeding is to review the action of the state board of equalization, and to correct certain errors alleged to have been committed by it, to the injury of plaintiff, in equalizing the assessments throughout the state for the year 1896. The plaintiff was assessed in Multnomah County on "merchandise and stock in trade," \$5,000; "one horse," \$50,—total, \$5,050. And it is

alleged: That the assessor of said county assessed the taxable property therein by the following classifications, and in the aggregate amounts set opposite, viz.: "Town and city lots, \$20,475,948; improvements on town and city lots, \$9,833,091; merchandise and stock in trade, \$2,319,690,"—which was equalized by the county board of equalization without change, and the roll certified to the secretary of state, and by him delivered to the state board of equalization; that said board attempted and pretended to revise and equalize the valuations and assessments of real and personal property appearing on said assessment roll according to said classifications and descriptions, "in connection with certified copies of the assessment rolls of all other counties in the state of Oregon, except the county of Marion"; "that the clerk of Marion County neglected and refused to make or certify or transmit to the secretary of state, or to furnish said state board of equalization, any copy of the assessment roll of said county for said year, and no duly certified or authenticated copy thereof was before said board, or considered by it," while in the discharge of their duties as such board. It is also alleged that said state board attempted and pretended to classify real property in the several counties in the state as "town and city lots," "improvements on town and city lots," "railroad lands," "wagon-road lands," "other nontillable lands," "tillable lands," "improvements on deeded and patented lands," "railroad tracks," and "telegraph and telephone lines," and to add and deduct percentages to or from the aggregate valuations in the several counties of each of said classes separately, but did not attempt or pretend to raise or equalize the valuation of personal property in Marion County according to the class or kind, except as to livestock, but attempted and pretended to add thirty per cent. to the aggregate valuation of all other personal

property in said county without any other classification or description, thereby increasing the same from \$1,327,-961 to \$1,726,349; that said board added twenty per cent. to the aggregate valuation of "town and city lots" and "improvements on town and city lots," and twenty-five per cent. to the appraised value of "merchandise and stock in trade," as classified upon the assessment roll of Multnomah County.

The return of the secretary of state to the writ has appended thereto a copy of the tabulated statement prepared by the state board of equalization, duly certified, showing that the board equalized real estate in two classes, viz.: Class 1, comprising "town and city lots" and "improvements on town and city lots"; and class 2, comprising "railroad lands," "wagon-road lands," "other nontillable lands," "tillable lands," "improvements on deeded and patented lands," "railroad tracks," "telegraph and telephone lines"; and personal property under the following heads, viz.: "Horses and mules," "cattle," "sheep and goats," "swine," "merchandise and stock in trade," "farm implements, wagons, carriages, etc.," "steamboats, machinery, etc.," "money," "notes and accounts," "shares of stock," "household furniture, etc.," "railroad rolling stock," and "improvements on lands not deeded or patented," except as it respects Marion county, which was equalized under three heads only, viz.: "Livestock," "railroad rolling stock," and "personal property, except livestock and railroad rolling stock." The board met December 1, 1896, and adjourned *sine die* on the 30th. Its proceedings show that after repeated efforts to obtain the assessment roll of Marion county, and after having secured, through a committee appointed for that purpose, a summary of such roll, it was, on December 26th, "moved by Win-gate, and seconded by Gibson, that the board begin the

preliminary consideration of livestock in Marion County, the rolls of that county having been received," which motion was adopted. It does not appear in the record, but is admitted by the parties, that the Marion county roll was not filed with the secretary of state prior to January 15, 1897. The lower court dismissed the writ, and plaintiff appeals.

At the outset it is claimed by the attorney-general that the application for the writ was not made within six months from the date of the determination complained of, but the record was not finally made up until December 30, 1896, and, the application having been made June 29, 1897, it was within the time.

1. The primary question involved in this proceeding is whether the board ever acquired jurisdiction for the exercise of its functions as an equalizing body. If this shall be resolved in the affirmative, we may then inquire whether it has exceeded its prescribed powers, or exercised its functions erroneously, to the injury of the plaintiff. The state board of equalization is a tribunal of judicial cognizance, possessing only inferior or special jurisdiction. It acts by virtue of the statute which brought it into being and prescribed its powers and functions, and, of course, it can exercise only the powers conferred by express enactment or by necessary implication. Its jurisdiction pertains only to the subject matter, and its functions are exercised in a summary manner. There are no parties to its proceedings, nor does it act *in rem*; so that a record is not essential to the establishment of jurisdiction of person or thing. FOLGER, J., in *Hunt v. Hunt*, 72 N. Y. 229, (28 Am. Rep. 129) says: "Jurisdiction of the subject matter is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a par-

ticular case arising, or which is claimed to have arisen, under that general question." MILLER, J., in *Cooper v. Reynolds*, 77 U. S. (10 Wall.) 316, says: "By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers or in authority specially conferred." Where, however, the exercise of jurisdiction is dependent inherently, or made so by statute, upon particular facts or any particular status or condition (as where the proprietor of an estate must be dead before a court of probate will administer his effects, or a crime must be committed in the county where the court is holden), they should be made to appear by proper averments in the record; otherwise the action of the tribunal would be *coram non judice*. *Davidsburgh v. Knickerbocker Insurance Co.*, 90 N. Y. 526; *Robinson v. Oceanic Navigation Co.*, 112 N. Y. 315, (2 L. R. A. 636; 19 N. E. 625.) The subject matter over which the board has been intrusted with power to act is simply to equalize the assessment of property, and to secure uniformity in valuations as between the different counties in the state; (*Or. & Cal. Railroad Co. v. Croisan*, 22 Or. 393, 30 Pac. 219); but, before it can proceed in the premises, it must be conceded that the assessment rolls must have been prepared, equalized, and approved by the county authorities.

Its prescribed manner of procedure is to appoint a secretary, whose duty it is to compile into tabulated statements for its use abstracts of the "assessment rolls received" from the various counties, and, when it shall have equalized the different classes of property, the result shall be combined in one table, and the chairman and secretary shall certify to the secretary of state the rate per cent. to be added to or deducted from the assessed

valuation of each class of property in the several counties, and also the aggregate valuation as equalized. Sections 4, 5 and 9 of an act to provide a state board of equalization, etc., (Sess. Laws 1891, p. 182). The statute is somewhat ambiguous in its reference to the "assessment rolls received," as the board receives none of them; and we presume the allusion is to the rolls received by the secretary of state, certified to by the county clerks, under the seal of the court, as required by section 2788, Hill's Ann. Laws. But the exercise by the board of its functions as an equalizing body is not made to depend upon the fact either that the various county rolls have been certified by the county clerks under the seal of the county courts, or that they have been received by or filed with the secretary of state; that is to say, these things are not imposed as conditions precedent to its assuming jurisdiction of the subject matter touching which it is empowered to act. Indeed, the board acts not upon the rolls, but upon the abstracts compiled into tabulated statements made by its secretary; and it is not necessary that the rolls themselves should be filed with it or actually before it, while exercising its delegated powers. When it has completed its deliberations, the duty is devolved upon it to combine the result into one table, which tabulated statement is intended to show, as it does in the present proceeding, the summaries of all the assessment rolls of the different counties, together with the changes made by the board in adding to and deducting percentages from the several classes of property; so that an inspection of the tabulated statement will disclose whether the board has acted upon the abstracts or summaries of the assessment rolls of all the counties in the state; and, if it has, jurisdiction to equalize them among the different counties appears by statutory intendment. Such is the record, and the only record, prescribed, and it was de-

signed to evidence the fact that all the preliminary requirements to enable the board to act in the premises had been complied with. If it had been deemed important that the certified rolls should have been actually received and filed by the secretary of state before the board should proceed with the exercise of its powers, the legislature would, no doubt, have indicated it in some direct manner, as it could easily have done. But it has imposed no such conditions to the exercise of its designated powers, and prescribed but a simple record, which, when made up in substantial accord with the legislative intendment, is quite sufficient to establish jurisdiction. See *Palmer v. Bank of Zumbrota*, 65 Minn. 90 (67 N. W. 895); *Hoffman v. Lynburn*, 104 Mich. 494, (62 N. W. 728).

2. Neither is the tribunal one of appellate jurisdiction. It is revisory, but not appellate. A single test will demonstrate the proposition. Mr. Brown, in his work on jurisdiction (section 19), says: "An appellate court is a court that does not have original jurisdiction, but reviews the acts of some subordinate court on appeal or by writ of error, and there affirms, reverses, or modifies the order, judgment, or decree of the inferior court, or, rather, the court of original jurisdiction." Now, there is no appeal or writ of error provided for by which parties, municipalities, or the state may obtain the correction of errors of any subordinate officer or county board. The state board is merely a part of the necessary machinery by which assessments are finally equalized as between the counties. *California Land Co. v. Gowen*, 48 Fed. 771; *People ex rel. v. Salomon*, 46 Ill. 343. It must exercise its functions, whether errors have been suggested to it or not; so that the certified rolls cannot be said to answer the purposes of a transcript from an

inferior tribunal in conferring jurisdiction to exercise its powers.

3. The office of a writ of review is to revise the proceedings of an inferior tribunal acting in the exercise of its judicial functions, where it is made to appear that it has exercised such functions erroneously, or to have exceeded its jurisdiction, to the injury of some substantial right of the plaintiff. Hill's Ann. Laws, § 585. It is substantially the common-law remedy by certiorari, which was invoked for the purpose of having the entire record of the inferior tribunal brought up for inspection, to determine whether it had jurisdiction, or had exceeded its jurisdiction, or had failed to proceed according to the essential requirements of the law. *California Land Co. v. Gowen*, 48 Fed. 775; *Donahue v. Will Co.*, 100 Ill. 94; *Hyslop v. Finch*, 99 Ill. 171; *State ex rel. v. Dodge Co.*, 56 Wis. 79 (13 N. W. 680); *McAllilley v. Horton*, 75 Ala. 491; *Town of Camden v. Bloch*, 65 Ala. 236; *Township of East Brunswick v. City of New Brunswick*, 57 N. J. Law 145 (30 Atl. 684).

4. It is alleged in the petition that the county court of Marion County neglected and refused to make, certify, or transmit to the secretary of state, or furnish said board of equalization, any copy of the assessment roll of said county, and that no duly certified or authenticated copy thereof was before said board or considered by it. But the record or tabulated statement of the board shows that it had the abstracts or summaries of the Marion county roll before it, and that it actually equalized the assessments of that county, together with all other counties in the state. There is no pretense that the board did not have or use a correct abstract of the roll subsequently filed in the secretary's office. Now, if its secre-

tary, or a committee appointed for that purpose, or the board itself, procured such abstract or summary from the original roll (and this is probably just what was done in the first instance), instead of from the certified copy in the secretary's office, the evidence thus obtained would, although of an inferior kind, if acted upon, necessarily lead to results identical with such as would follow from a consideration of the evidence obtained from the rightful source; so that, in any event, no harm could come to the petitioner. It may have been an irregularity for the board to have proceeded to the consideration of the Marion county roll upon an inferior kind of evidence of its contents, but it was clearly not an excess of power or jurisdiction to so proceed, because it could perform its functions as well by a consideration of the evidence at hand. But the case is even stronger than this. The minutes of the board show that on the thirtieth day of December it began the preliminary consideration of livestock in Marion County, "the rolls of the county having been received." Suppose, as we may infer from these minutes, that the certified Marion county roll had been received by the board prior to its delivery at the secretary of state's office, and that, having the certified copy actually before it, but prior to its filing by the secretary of state, it considered and concluded the equalization of the assessments of all the counties in the state, Marion included; could it be affirmed that the board exceeded its jurisdiction, and that its acts were void, simply because the roll had not been filed with the secretary of state and the abstract and summary made by the board's secretary after filing? Even if there was error in such a proceeding, it could not have resulted to the injury of plaintiff in any substantial right. And yet we are asked to set at naught the proceedings of the state board of equalization after it had become *functus officio*, which

would nullify, to say the least, the entire assessment and levy of the state taxes for the year 1896. Surely, it would require a cause of much greater potency to induce a court to entertain a proposition fraught with such far-reaching and deleterious results. Courts are always solicitous in the protection of the rights of individuals, however slightly they may be affected; but when no appreciable injury can result from the action of an inferior tribunal, though it may have proceeded somewhat irregularly, where it does not exceed its jurisdiction or power to act in the premises, the superior court will not intervene to quash the proceeding.

5. A further contention questions the classification made by the assessors. In their assessments of real property, they valued "town and city lots" separately from their improvements, which latter are embraced under the head of "improvements on town and city lots"; that is to say, "town and city lots" and "improvements on town and city lots" are assessed and valued under distinct heads and in separate columns upon the rolls. The state board of equalization, however, considered them as but a single class, and so equalized them. The objection involves the power and authority of the assessors to list such property in the manner indicated, it being claimed that town and city lots and their improvements must be assessed under one head, and that their valuation in separate columns upon the rolls was illegal and without authority of law, and hence that the board was without power to equalize the assessment under one classification among the different counties of the state. Under the law of the state, there are but two classes of real property for the purpose of assessment and taxation, viz.: City, village or town property, which is divided into lots and blocks, and all other real property which is described by

legal subdivisions or in such manner as to make the description certain: *Or. & Cal. Railroad Co. v. Croisan*, 22 Or. 400 (30 Pac. 219). It was the evident purpose of the legislature, in thus classifying real property; to secure a separate consideration of the values of either class, they being inherently different and distinct both in value, situation and condition, as well as to render it more convenient for owners of parcels to determine what charge or claim is being made against them on account of their ownership. It is clear that a listing of the two classes of property under one head, and an extension of values to a single column, would so confuse the assessment as to make it inconvenient, if not impracticable, to segregate and ascertain the assessed value of parcels belonging to either class, and would defeat the purpose of the law in requiring a separate consideration of value for assessment purposes. For these reasons, the direction for a separate listing and assessment of the designated classes is considered to be imperative and mandatory, and, if unobserved, renders the assessment void: *People v. Owyhee Min. Co.*, 1 Idaho, 409; *Cooley, Tax'n* (2d ed.) 395.

But *non constat* that a listing and valuation by subdivided classifications is also void. The statute gives a form of assessment roll which indicates the separate listing and valuation of the two classes of property, but by the section which contains the form it is provided that such additional columns shall be added as may be deemed necessary, varying the same as circumstances may require: *Hill's Ann. Laws*, § 2776. Under this statute, it is quite probable that whenever it is deemed necessary to a more convenient and accurate assessment of real property that the lands and the improvements thereon be valued separately, and extended in separate and distinct columns, the proper officer would have authority to so formulate the rolls, and the assessors would be war-

ranted, if not in duty bound, in following the directions for making them up. But, however this may be, under section 2769, Hill's Ann. Laws, the assessor may require every person to furnish a list under oath of his real estate and all his personal property liable to taxation. These lists are usually made out upon blank forms furnished by the assessors. Now, if, for the purpose of a more perfect and definite ascertainment of the ownership, condition and true cash value of town and city lots, the owner is required to designate not only the land, but the improvements thereon, and they are valued separately, what objection can there be to the method thus adopted for the ascertainment of values? If the ownership of both lot and improvements are in one and the same person, it requires but an application of the simple process of addition for the ascertainment of the true cash value thereof. The method would seem to be a reasonable, if not a necessary, one for the convenient and more accurate ascertainment of ownership and of such values. But to go a step further: Suppose the assessor has carried the separate valuations thus ascertained, made and determined upon the assessment rolls into separate columns, which is probably just what has been done in every county in the state, would such an act render the assessment and consequently the rolls void, as it may pertain to that particular class of property, or would it amount to a mere irregularity which would not relieve the taxpayer from the payment of the taxes levied upon his property? For it must be conceded that, in order to oust the state board of equalization of jurisdiction to perform such of its functions as pertain to any particular class of property, the assessment roll must be absolutely void, and that an irregularity only could not produce such a result.

6. The state board is in no sense a board of review, with power to correct the errors of the county boards or the assessors. They deal with assessments of individuals, and an equalization of values between them; and the state board with equalization between districts, to wit, between the several counties in the state,—functions entirely dissimilar and distinct: *Or. Mtg. Sav. Bank v. Jordan*, 16 Or. 113 (17 Pac. 621); *Oregon & C. R. Co. v. Lane Co.*, 23 Or. 386 (31 Pac. 964); *Ramp v. Marion Co.*, 24 Or. 461 (33 Pac. 681); *Godfrey v. Douglas Co.*, 28 Or. 446 (43 Pac. 171); *Becker v. Malheur Co.*, 24 Or. 217 (33 Pac. 543).

7. So, it is clear that the courts, through the instrumentality of a writ of review from the action of the state board, cannot correct the errors and irregularities of the assessors and county boards in making up the rolls.

We cannot think that such an act of the assessors would render the assessment absolutely void. It may be—and this we do not decide—that the rolls have been unnecessarily incumbered by carrying into them too much of the minutiae of ascertaining the condition, ownership and values of this class of property; but it may be treated as a surplusage that does not void the assessment thereof. The assessment is there, as is also the valuation; and it needs but an addition of the separate valuations to the ascertainment of the aggregate, and all has been accomplished necessary to a valid assessment. No injury or harm would come to the taxpayer by the method pursued, and it is clear that he could not escape the payment of his tax upon that ground. Analogous cases seem to sustain this principle. In *Wall v. Trumbull*, 16 Mich. 228, it appears that the statute required that a certain bounty tax should be cast in the same column with other township taxes; but, as a matter of

fact, it was placed upon the roll in a separate column, and it was held that this did not render the bounty tax void, as no one was injured thereby.

Torrey v. Inhabitants of Millbury, 21 Pick. 64, comes nearer to the case at bar, and we cannot better set forth the facts and ruling in that case than by quoting somewhat extensively from the opinion of Chief Justice SHAW. He says: "The first objection to the irregularity of the assessment is that the assessors did not comply with the directions of the statute in making out the list containing the valuation and assessment of polls and estates, inasmuch as it did not exhibit in distinct columns 'the true value of real estate,' 'the reduced value of real estate,' and the same of personal estate, but only one column for real, and one for personal, headed 'value': Rev. St. c. 7, §§ 15, 29, 30. The Revised Statutes, in the sections cited, require that the list, amongst other particulars, shall distinguish 'true value' and 'reduced value.' The question is whether this irregularity renders the valuation and assessment void, so that each person taxed may take advantage of it, and recover back the amount paid.

* * * We take it to be clear that the requisition in question is founded on the common custom of forming a column of 'reduced value,' which had existed before the statute, adopted for the ease and convenience of computation in apportioning the taxes. But the reduced value is, of course, a fixed proportion of the true value, as a half, or quarter, 10 per cent., or the like. The true value is first determined by the assessors in the manner provided by law; that is, by returns, or, in default of returns being made, by appraisement; and then the column of reduced value is found by computation, upon a uniform scale of reduction. It follows, therefore, as a necessary consequence, that whether there be a column of reduced value or not makes no difference as to the actual

amount of property for which each one on the list is assessed, or the rate which each and every one will have to pay. It is a requisition merely affecting the mode of framing the tax list, not affecting in any degree the rights of any taxpayer; and therefore the court are of opinion that it is directory, not a condition precedent, and that the failure to comply with it on the part of the assessors did not render the tax illegal or void."

We think it clear that the assessment rolls are not rendered void by the manner of assessing town and city lots and their improvements, and that the jurisdiction of the state board was in no way affected thereby. The method pursued by the board itself was unobjectionable, as it considered the lots and their improvements in one class, and subjected both to a uniform percentage of addition or reduction in all cases; and this is all that could be required of it if the aggregates had been extended or carried into one column. We are therefore of the opinion that its acts in equalizing the values of this class of property are valid. What we have said here will apply with equal force to the board's action touching its equalization of values under one classification of all other real property, whether designated upon the roll under segregated headings or not.

8. We come now to the consideration of the board's action in the equalization of assessments as respects personal property. It appears from the tabulated statement that personal property was classified upon the assessment roll of Marion County under three heads only, viz.: "Railroad rolling stock," "livestock," and "personal property, except railroad rolling stock and livestock"; while the rolls of the other counties in the state contain some twelve or thirteen different classifications of the same species of property, and none of them correspond-

ing with the classifications in Marion except the one denominated "railroad rolling stock." Now, the board has attempted to equalize by taking each particular classification, whether appearing upon the Marion County roll or the rolls of the other counties, as a basis for its operation, and has added and deducted percentages accordingly. For instance, in Baker County twenty per cent. has been added to the aggregate valuation of horses and mules, twenty per cent. to cattle, and twenty per cent. deducted from swine, while sheep and goats remain the same. In Benton County twenty per cent. is deducted from the aggregate valuation of horses and mules, twenty per cent. added to the cattle, twenty per cent. deducted from sheep and goats, while swine remain the same; and thus are all these classifications observed in the equalization of the several kinds of livestock in all the counties except Marion, and as to it the state board has added ten per cent. to the aggregate valuation of livestock, which is a different classification, but comprises the four classifications enumerated in the other counties. So, it has in all the counties except Marion attempted to equalize other personal property under such classifications as "merchandise and stock in trade," "notes and accounts," "shares of stock," etc., but in Marion all these are comprised in one classification only.

The mode or manner in which the board shall equalize personal property is prescribed by the act, which is that it shall add to or deduct from the aggregate valuation of the several kinds or classes thereof so as to make them conform to their true cash value. See section 8 of the act to provide a state board of equalization, etc., *supra*. This is a legislative recognition that there exist different kinds and classes of that species of property, but nowhere is there any attempt, that we know of, to specify the classifications, nor to indicate what kind of property shall

be comprised in each. This matter was probably intended to be regulated by the form of the assessment rolls prepared and sent out to the several county clerks, and by them distributed to the assessors: Hill's Ann. Laws, §§ 2776, 2848. The blank rolls are certainly intended as a direction to the county officials, and should be followed, as it tends to produce uniformity in classifications, which is essential to equality in assessment and taxation. Be that as it may, it is very evident that the state board could not, by adopting dissimilar classifications or such as are not uniform throughout all the counties as a basis for their deductions, produce that uniformity and equality in values contemplated by the constitution: Const. Or. art. I, § 32; art IX, § 1. "Equality in the rate of assessment," says WALDO, C. J., in *Crawford v. Linn Co.*, 11 Or. 484 (5 Pac. 738), "means proportional valuation." And to secure a uniform and proportional valuation of the different classes or kinds of personal property among all the counties was, no doubt, the purpose of the act. Horses and mules may have been valued relatively lower in Marion than in Baker and Benton, and cattle, sheep, and goats, and swine very much higher; but, by a comparison with livestock in the other counties of the state,—and this is the only way by which relative values can be determined,—it may appear that livestock in Marion is assessed too high, which would necessitate a reduction thereof by the requisite percentage; but this would actually reduce the valuation upon horses and cattle in Marion County, which is already relatively lower than its kind in Baker and Benton, so that the process would increase, instead of diminish, the disparagement between the values of horses and mules in Marion and the same class of property in Baker and Benton. A method that will produce such a result is radically wrong, and is subversive of the constitutional requirements touching as-

assessment and taxation. There must be uniformity of classification to produce proportional or uniform values among all the counties in the state. This is almost self-evident, and it is needless to discuss the proposition at greater length.

The plaintiff was assessed in Multnomah County upon merchandise and stock in trade, the valuation of which was raised by the state board twenty-five per cent.; but, the board having considered it under a different classification from that under which the same kind of personalty was considered in Marion, it has exceeded its powers, and the increase is void. There was no increase in Multnomah upon horses, so that the only injury which could have resulted to petitioner is by reason of the raise in the value upon his merchandise and stock in trade; and hence the judgment of the court will be that the action of the state board of equalization be set aside and declared void in so far as it attempted to equalize the valuation of the particular class or kind of personalty denominated "merchandise and stock in trade." Reversed and remanded, with directions to the lower court to enter judgment in accordance with this opinion.

REVERSED.

Decided 24 October, 1898.

STATE v. GARDNER.

[54 Pac. 808]

1. CRIMINAL LAW—JURISDICTION OF CIRCUIT COURT.—The provision of laws, 1893, p. 63, dividing the third judicial district into two departments is directory only, and under the clause permitting any business of the court to be done in either department in which either judge may act the judge of department No. 1 may preside in a criminal proceeding although the act provides that criminal proceedings shall be heard and determined in department No. 2: *Baisley v. Baisley*, 15 Or. 183, applied.
2. BILL OF EXCEPTIONS—PART OF EVIDENCE—PRESUMPTION.—When the bill of exceptions does not contain all the testimony it will be presumed that the verdict was supported by the evidence, and that it is according to law.

88	149
89	95

88	149
41	14
41	508

33	149
45	88

3. **NEW TRIAL—DISCRETION OF COURT.**—Motions to set aside verdicts and for new trials for insufficiency of the evidence are discretionary and the orders thereon are not appealable: *State v. Foot You*, 24 Or. 61, approved.
4. **NEW TRIAL—SURPRISE.**—Where a party did not move for a continuance at the time an alleged surprise occurred, but waited until after a verdict, he waived the objection.
5. **NEWLY DISCOVERED EVIDENCE.**—A new trial will not be granted on the ground of newly discovered evidence where such evidence merely tends to impeach the adversary's witnesses: *Territory v. Latshaw*, 1 Or. 146, applied.

From Marion : GEO. H. BURNETT, Judge.

L. F. Gardner appeals from a conviction for rape.

AFFIRMED.

For appellant there was a brief over the name of *Robert J. Hendricks*, with an oral argument by *Messrs. Hendricks and Tilmon Ford*.

For the state there was a brief over the names of *Cicero M. Idleman*, attorney-general, *Samuel L. Hayden*, district attorney, and *John H. McNary*, with an oral argument by *Messrs. Idleman and McNary*.

MR. JUSTICE MOORE delivered the opinion.

The defendant, L. F. Gardner, was convicted of the crime of rape, alleged to have been committed by having sexual intercourse with one Mabel Hitchman, a female under the age of sixteen years; and, having been sentenced to imprisonment in the penitentiary for the term of seven years, he appeals, assigning as error the action of the trial court in refusing to grant a new trial on the ground of surprise, newly discovered evidence, insufficiency of the evidence to support the judgment, and because the verdict is against law.

1. As a preliminary matter, it is insisted that the judge before whom he was convicted had no authority to

preside at his trial, and that the judgment is void, and should be set aside. The question presented for consideration involves a construction of an act of the legislative assembly providing for an additional circuit judge for the Third judicial district of the State of Oregon. Laws 1893, p. 63. The business of the court in said district is divided into departments, numbered 1 and 2, respectively, and the act in question provides that all criminal proceedings, except as otherwise provided therein, shall be heard and determined in department No. 2, but that it shall be lawful to do any business of said court in either department in which either judge may act. The record shows that Hon. George H. Burnett, judge of department No. 1, presided at defendant's trial, and pronounced the sentence which was imposed; but it nowhere appears that the indictment was returned into or that the trial was had in said department. The defendant's counsel, in support of their motion for a new trial, filed affidavits in which the title of the court is given as "Department No. 1," and the briefs on file also contain the same recital, but there is nothing further in the record to show that Judge Burnett was not holding court in place of Hon. H. H. Hewitt, the judge of department No. 2, or that the cause had not been properly transferred to department No. 1. In *Baisley v. Baisley*, 15 Or. 183 (13 Pac. 888), it is held, in effect, that, notwithstanding the legislative assembly may create several departments of the same court, there can be but one circuit court in each judicial district, and that under section 9 of article VII of the constitution of Oregon the jurisdiction of causes is vested in the court, and not in any particular judge or department thereof. Inasmuch as the act under consideration renders it lawful to do any of the business of the court in either department, it is manifest that the clause providing for such division is directory only,

and that Judge Burnett had authority to try the case at bar.

2. Considering the errors assigned in reverse order, the bill of exceptions does not purport to contain a transcript of all the testimony introduced at the trial, and, this being so, it must be presumed that the verdict is supported by the evidence, and that the judgment is according to law.

3. It has been repeatedly held in this court that a motion to set aside a verdict, or for a new trial for insufficiency of the evidence, is addressed to the sound discretion of the trial court and that its ruling thereon cannot be assigned as error on appeal: *Bowen v. State*, 1 Or. 271; *State v. Fitzhugh*, 2 Or. 227; *State v. Wilson*, 6 Or. 428; *State v. McDonald*, 8 Or. 113; *State v. Drake*, 11 Or. 396 (4 Pac. 1204); *State v. Becker*, 12 Or. 318 (7 Pac. 329); *State v. Mackey*, 12 Or. 154 (6 Pac. 648); *State v. Roberts*, 15 Or. 187 (13 Pac. 896); *State v. Clements*, 15 Or. 237 (14 Pac. 410); *State v. Foot You*, 24 Or. 61 (32 Pac. 1031, and 33 Pac. 537).

4. Assuming, however, that error can be predicted upon the refusal of the court to set aside the verdict and grant a new trial, we will consider the case as made by the record. The affidavits in support of the motion for a new trial show that Mabel Hitchman testified at defendant's preliminary examination, and also before the grand jury, that the crime was committed May 20, 1897, and the indictment so alleged the fact. At the trial, however, she testified that the overt act occurred a month earlier, and this change is the surprise of which the defendant complains, and which his counsel insist affords ground for a new trial. At the time the testimony was so given, no motion for a continuance was made, and de-

fendant waited until after the verdict was rendered before making any effort to guard against the effect of the alleged surprise. The rule is well settled that to entitle a party to have a judgment set aside on account of surprise, it must appear he immediately applied for a postponement of the trial when the surprise occurred, and that he cannot speculate upon the chances of obtaining a favorable verdict, and, after having failed in this respect, urge as a ground for a new trial any matter that occurred at the trial, and was known to, but waived by, him: 16 Am. & Eng. Enc. Law, 532; *Beadle v. Graham's Adm'r*, 66 Ala. 102; *Rogers v. Huie*, 1 Cal. 429 (54 Am. Dec. 300); *Brooks v. Douglass*, 32 Cal. 208; *Doyle v. Sturla*, 38 Cal. 456; *Dewey v. Frank*, 62 Cal. 343; *Carr v. Gale*, 1 Curt. 384 (Fed. Cas. No. 2,433); *Young v. Com.*, 4 Grat. 550; *Walker v. Kretsinger*, 48 Ill. 502; *Bell v. Gardner*, 77 Ill. 319; *Washer v. White*, 16 Ind. 136; *Gee v. Moss*, 68 Iowa, 318 (27 N. W. 268); *Haber v. Lane*, 45 Miss. 608; *Wells v. Sanger*, 21 Mo. 354; *Shipp v. Suggett*, 9 B. Mon. 5; *Hoskins v. Hight*, 95 Ala. 284 (11 South. 253); *Baker v. Boon*, 100 Ala. 622 (13 South. 481); *Oliver v. Herron*, 106 Ala. 639 (17 South. 387); *Jackson v. Warford*, 7 Wend. 62.

5. The newly discovered evidence relied upon as a ground for a new trial consists in the testimony of the grand jurors which tends to contradict the testimony of Mabel Hitchman to the effect that she testified before the grand jury that the crime was committed April 20, 1897. A new trial will not be granted to enable a party to impeach his opponent's witnesses: 16 Am. & Eng. Enc. Law (1st ed.), 545; *Territory v. Latshaw*, 1 Or. 146. Failing to discover any abuse of discretion in the action of the trial court in overruling the motion for a new trial, it follows that the judgment is affirmed.

AFFIRMED.

Decided 14 September, 1898; rehearing denied.

KNIGHT v. HAMAKER.

[54 Pac. 277, 650]

1. **REMOVAL OF ADMINISTRATOR—EFFECT ON APPEAL.**—After an administrator has been removed he no longer has authority to represent the estate, and an appeal taken by him while in office will be dismissed unless his successor desires to continue it.
2. **EFFECT OF REMOVING ADMINISTRATOR.**—An appeal from an order deposing an administrator does not suspend the operation of the order; the removal is in force until reinstatement. Such is evidently the effect of Hill's Ann. Laws, §§ 1090, 1098 and 1100 which provide that upon the removal of an executor or administrator his powers shall terminate, and the further management of the estate shall devolve upon the co-trustee or whoever may be appointed: *Day v. Holland*, 15 Or. 464, applied.

From Klamath: W. C. HALE, Judge.

Proceeding by N. B. Knight against J. W. Hamaker, administrator of Warren H. Mills, on a claim. Appeal of the administrator to the circuit court from an adverse order was dismissed, and he again appeals.

DISMISSED.

For appellant there was a brief over the names of *Reddy, Campbell & Metson*, and *J. W. Hamaker*.

For respondent there was a brief over the names of *N. B. Knight*, in *pro per.*, *John S. Orr*, *Geo. S. Nickerson*, and *Wm. M. Kaiser*.

MR. JUSTICE BEAN delivered the opinion.

On May 13, 1895, the respondent, Knight, filed in the County Court of Klamath County a petition for an order directing the appellant, Hamaker, as administrator of the estate of Warren H. Mills, deceased, to pay to him the sum of \$1,329 on a claim which he had against the estate; and, on a hearing regularly had, the

33	154
33	203
33	204
38	154
40	453

county court adjudged and decreed that the said claim was legal and valid, and directed Hamaker to pay the same in full out of the assets in his hands belonging to the estate. From this order Hamaker appealed to the circuit court, and on November 8, 1895, his appeal was dismissed. On March 24, 1896, he perfected an appeal to this court; but on July 7, 1896, and before the filing of the transcript, he was removed as administrator by an order of the county court, and John F. Miller appointed his successor, to whom letters of administration were regularly issued, notwithstanding which Hamaker filed a transcript on appeal in this court, on the 21st of September following. In January, 1897, Miller as administrator of the estate, appeared by an attorney, and moved to dismiss the appeal, disclaiming any desire to further prosecute the matter; and, at the same time the respondent, Knight, filed a similar motion, on the ground that Hamaker had ceased to have any interest in the subject matter of the litigation. Both these motions were on January 11, 1897, overruled *pro forma*, but with permission to the respondent and Miller to renew them on the final hearing of the case, which was done accordingly.

1. In our opinion, the motion of Miller must be allowed. An administrator derives his authority to act exclusively from the appointment of the county court, and when such authority is withdrawn or revoked his power to act for the estate must necessarily cease. He is but the manager of an estate, under the orders of the court and the provisions of the statute, and his authority is derived solely from that source. When it is revoked, he has no right to longer participate therein, or to control any of the proceedings in which it is interested. And as it is clear that a party cannot prosecute an appeal from a judgment unless he is in some way aggrieved by it,

either personally or in some representative capacity, it necessarily follows that when Hamaker was removed as administrator, and Miller appointed in his place, the right to control further proceedings on the appeal vested in Miller, as the representative of the estate; and, if he does not desire to proceed any further in the matter, Hamaker ought not to be heard to object. The motion of Miller to dismiss the appeal is therefore sustained.

DISMISSED.

ON MOTION FOR REHEARING.

MR. JUSTICE BEAN delivered the opinion.

2. Plaintiff claims that his appeal from the order of the county court removing him as administrator revived his letters, and gave him the right to resume authority as administrator, and to control the affairs of the estate pending the determination of such appeal. But, as we understand the law, an appeal from an order removing an administrator does not stay the operation of the order while the appeal is pending. The statute provides that the court may, upon the petition of any heir, legatee, devisee, creditor, or other person interested in the estate, or upon its own motion after citation, remove an unfaithful executor or administrator, and revoke his letters, and that in such case, if there be a co-executor or co-administrator, he shall thenceforth exercise the powers and perform the duties of the trust, and, if not, administration of the estate remaining unadministered shall be granted to those next entitled, if they be competent and qualified: Hill's Ann. Laws, §§ 1090, 1098, 1100. These provisions clearly contemplate and provide that the powers of an administrator or executor shall termi-

nate at the date of his removal by the county court, and that the administration of the estate remaining unadministered shall immediately devolve upon a co-executor or co-administrator, if there be one, and, if not, upon the person to whom letters shall be granted; and an appeal does not restore him to that office pending its determination, in the absence of a statute to that effect: *Dutcher v. Culver*, 23 Minn. 415; *Day v. Holland*, 15 Or. 464 (15 Pac. 855). During the pendency of the appeal his authority is suspended, and he has no power to control or manage the affairs of the estate until reinstated by an order of the appellate tribunal.

The other points made in the petition for rehearing may be passed with a very brief notice. Counsel is mistaken in his statement that the plaintiff and Miller failed to appear at the time set for the hearing of the motions to dismiss, or that they abandoned such motions; and he is equally in error in his statement that, subsequent to the hearing of the case on the merits, the respondent was permitted to file a supplemental brief, of which he had no notice. The plaintiff and Miller appeared by counsel at the hearing of their motions to dismiss, and have never at any time abandoned them, but, on the contrary, renewed and urged the same with vigor on the final hearing, both in his original brief and at the argument. The supplemental brief, of which counsel complains, was filed at the final hearing. If he had no notice thereof, it was because he was not present, but, at his request and for his accommodation, had been permitted by the courtesy of the court to present his side of the case the day before. Petition for rehearing denied.

DISMISSED: REHEARING DENIED.

Decided at PENDLETON August 13, 1898.

STATE *v.* MINNICK.

[54 Pac. 223]

APPEAL BY STATE IN CRIMINAL CASE.—The state cannot appeal from any orders or judgments in a criminal case, except those mentioned in sec. 1430, Hill's Ann. Laws; so that no appeal lies from a judgment of acquittal, even if entered on a verdict ordered by the trial judge.

FORMER ACQUITTAL.—An appeal did not lie at common law from a judgment sustaining a plea of former acquittal.

From Union : ROBERT EAKIN, Judge.

John Minnick having been acquitted on a charge of larceny, the state appealed, whereupon the defendant filed a motion to dismiss.

DISMISSED.

Thomas H. Crawford and *J. L. Austin* for the motion.

Hugh E. Courtney, district attorney, *contra*.

MR. JUSTICE WOLVERTON delivered the opinion.

The defendant was indicted for the crime of larceny, and interposed a plea of former acquittal. The state demurred to the plea, and, the demurrer being overruled, a trial was had, at the close of which the court instructed the jury to return a verdict of not guilty, and, the defendant having been discharged upon the return of such verdict, the state appealed. The defendant filed a motion to dismiss the appeal, assigning as a reason therefor that the state has no right of appeal under such conditions, and this presents the sole question for determination.

The statute has prescribed that an appeal may be taken to the supreme court by the state from a judgment or order of the circuit court in a criminal action in the fol-

lowing cases: (1) Upon a judgment for the defendant on a demurrer to the indictment, and (2) upon an order of the court arresting the judgment. Hill's Ann. Laws Or., § 1430. It is plain that the state's case does not fall within either of the two grounds of error for which the right of appeal is thus directly accorded, and, these being exclusive, the state can assign no other. Section 1427, Id., provides that "the party aggrieved, whether the state or the defendant, may appeal from a judgment in a criminal action in the cases prescribed in this chapter and not otherwise." The latter words of the section constitute an express limitation upon the right of appeal in criminal matters, and preclude the state from resorting to that mode of reviewing judgments and orders of the circuit court, other than those enumerated in section 1430: *People v. Snyder*, 44 Hun, 193; *State v. Bollinger*, 69 Mo. 577; *State v. Risley*, 72 Mo. 609; *People v. Dempsey*, 66 How. Prac. 371. Even independent of the statute, the right of appeal or writ of error did not lie at common law from the judgment of the court in sustaining a plea of former acquittal: *State v. Lane*, 78 N. C. 547. So that, in any event, the state is without the right to be heard, and the motion to dismiss must be allowed, and it is so ordered.

DISMISSED.

Argued 29 March; Decided 30 April, 1898.

PATTON v. NIXON.

[52 Pac. 1048]

1. **EQUITY—MULTIPLICITY OF SUITS.**—Equity will grant relief to one who has made a conveyance of property in consideration of her future support, although the plaintiff has a remedy at law, and to avoid a multiplicity of actions will make the maintenance of the plaintiff a charge upon the premises. *Watson v. Smith*, 7 Or. 448, cited.
2. **DECREE—ISSUES MADE BY THE PLEADINGS.**—A decree which charges the plaintiff's maintenance upon land conveyed by her in consideration of future

support is within the issue made by the pleadings where it is alleged that to secure a home and care the plaintiff transferred her property as a gift, and the reply denies that the defendant agreed to clothe and support the plaintiff in consideration of the title received.

From Washington : THOMAS A. McBRIDE, Judge.

Suit by Mary Patton against her daughter Mary F. Nixon and another for the re-conveyance of land. There was a decree for plaintiff, and defendants appeal.

MODIFIED.

For appellants there was a brief and an oral argument by *Mr. Samuel B. Huston*.

For respondent there was a brief and oral argument by *Messrs. Thomas H. Tongue and John T. Whalley*.

Mr. Chief Justice MOORE delivered the opinion.

Plaintiff alleges that on June 14, 1894, plaintiff being the owner in fee and in possession, by her tenants, of lots 1 and 2 in block 15, and lots 1, 2, 3, and 4 in block 16, in the city of Forest Grove, having two houses and a barn thereon, defendant, representing that said tenants were insolvent, had not paid the rent reserved, and could not be dispossessed unless the premises were conveyed to another, promised that, if a deed therefor were executed to her, she would care for the property, collect rents, hold the legal title thereto in trust for plaintiff, and reconvey the same upon being requested so to do ; that on said day, plaintiff's mind being very weak in consequence of her extreme age, feeble constitution, and recent illness, she was incapable of fully comprehending the nature of her acts, and, believing and relying upon said representations, she, without any consideration therefor, executed to defendant a conveyance of said premises ; that, prior to the

commencement of this suit, plaintiff requested defendant to reconvey said property, but the latter refused to do so, agreeing to pay therefor the sum of \$3,500, as the purchase price thereof, no part of which has ever been paid. The defendant, after denying the material allegations of the complaint, alleges: "That, at the time mentioned in the complaint, the plaintiff, in consideration of the fact that the defendant had kept and cared for the plaintiff, and paid the taxes on said property for several years, and had kept and cared for the husband of the plaintiff during his last illness for five and one-half months, and had paid his funeral expenses, and had never received any compensation therefor; and in consideration of the fact that brothers and sisters of this defendant had received large amounts of property from their father's estate, while this defendant had received nothing but two acres of land; and in further consideration of the fact that this defendant had repeatedly told plaintiff that she would furnish a home and care for plaintiff as long as she lived; and in further consideration of love and affection and other valuable consideration,—the plaintiff executed said conveyance and transferred said property to this defendant as a gift, and of her own free will and accord, and without any suggestion or representation or solicitation of this defendant. That plaintiff placed said deed on record, and repeatedly expressed herself to the effect that the same was a gift, and continued to live with this defendant until about October, 1895, when she was taken from the home of the defendant, in the absence of the latter, and without her knowledge, and taken to the home of her son-in-law, where she has since remained; that, during all the time which she remained at the home of defendant, defendant provided her with a good home, and kept and

cared for her as tenderly and carefully as possible, and is ready and willing to keep and care for her as long as she lives if she will remain with the defendant."

The reply having put in issue the allegations of new matter contained in the answer, a trial was had; and, from the evidence taken, the court found that plaintiff executed said deed in pursuance of defendant's agreement to furnish, during her life, the necessary clothing, support, medicine, and medical attendance, but by reason of plaintiff's incapacity to attend to business, and her inability properly to understand the nature thereof, or the manner of conducting the same, the deed was delivered without taking from the grantee any memorandum evidencing the obligations assumed by her; that no sum whatever was paid for said premises, nor did any consideration pass to plaintiff from defendant, except the latter's verbal agreement to furnish said support, clothing, medicine, and medical attendance, upon the faith of which agreement plaintiff relied, and without which she would not have excuted the deed; that defendant has refused to keep or perform her agreement, whereby plaintiff sustained damage equivalent to the reasonable value of such food, clothing, medicine, and medical attendance, which the court found to be the sum of \$275 per annum; and thereupon decreed said sum to be an annual charge and prior lien upon said premises, during plaintiff's life, payable in quarterly installments of \$68.75 each, the first becoming due March 20, 1896, from which decree defendant appeals.

1. It is contended by defendant's counsel that plaintiff had an adequate remedy at law; and that, having failed to establish the equity upon which she relied, the court erred in retaining the cause and awarding damages; and that the decree complained of is not within

the issues made by the pleadings, nor supported by the evidence, for which reason it should be reversed, and the suit dismissed. In *Watson v. Smith*, 7 Or. 448, a suit was instituted to cancel a deed, in consequence of defendant's alleged failure to support plaintiff and his wife during their lives; and it was held that, there being no willful violation of the contract, the deed could not be avoided, notwithstanding which a decree was rendered making such support, which formed the consideration for the conveyance, a lien upon the premises so conveyed. True, plaintiff has a remedy at law against defendant for her support, and she could undoubtedly, from time to time, maintain actions therefor; but equity, in order to prevent this multiplicity of actions will take jurisdiction, and in a single suit award complete relief, making the support, which formed the consideration for the conveyance, a charge upon the premises.

2. The rule that the decree in a suit must correspond with the allegations as well as the proofs is so universal that to cite decisions in support thereof would seem to be pedantic. Examining the pleadings in the light of this rule, it will be observed that the answer alleges that, "in further consideration of the fact that this defendant had repeatedly told plaintiff that she would furnish a home and care for plaintiff as long as she lived, * * * plaintiff executed said conveyance, and transferred said property to this defendant as a gift." This allegation tends to show that the promise of such support afforded in fact the consideration for the conveyance of the property, and, considered in connection with the fact that plaintiff was eighty-one years old when these lots (valued at about \$3,500) were conveyed to defendant, is not very much in conflict with the claim therein that the conveyance was a gift. The allegation of support, etc., is denied in the

reply, thus raising an issue upon which the court might very reasonably find from the evidence that defendant agreed to care for, clothe, support, and maintain her mother during her life, in consideration of the title received; and, such being the case, the decree in this respect is fairly within the issue made by the pleadings. To reach a different conclusion would be equivalent to holding that a confiding mother, very aged and quite feeble, unaccustomed to the methods of transacting business, might deprive herself of every particle of her property by conveying it to her daughter in consideration of the latter's previous promise to furnish her a home, and support her in her declining days, and that thereupon the grantee may deny that any agreement was entered into as a result of such promise, and turn the plaintiff out upon the charity of the public,—a result which would clearly be a denial of justice, and must necessarily shock the conscience of those who believe that right should prevail. The trial court properly held that the allegation of the answer, to the effect that defendant promised to support her mother, ripened into an agreement when the latter accepted the terms thereof, in pursuance of and without which, as the court finds, she would not have executed the deed; and, this being so, the remaining question is whether there is any evidence tending to show the value of such support. Plaintiff testifies that, prior to said conveyance, she boarded with defendant, and paid her therefor the sum of \$4.25 per week; and, while defendant denies that she ever charged or received any compensation for such board, her sister, Mrs. Bates, testifies that defendant advised her to charge her mother for board, stating that she paid her while boarding with her. At this rate plaintiff's board would be worth \$221 per annum, and, as this is all the evidence introduced on that branch of the subject, the decree must be modified, and

Nov. 1898.]

EX PARTE MCGEE.

165

one here entered awarding plaintiff the sum of \$221 per annum, payable in quarterly installments, at the same time and secured in the same manner as indicated in the decree, which is otherwise affirmed.

MODIFIED.

Argued October 27; decided November 14, 1898.

EX PARTE MCGEE.

[54 Pac. 1091]

88	165
139	8

IMPRISONMENT FOR FAILURE TO PAY FINE.— Under sections 2131 and 1406, Hill's Ann. Laws, giving to a justice of the peace the same power as to fines and imprisonments that is possessed by the circuit courts, and prescribing how a judgment of fine in the latter court must be executed, a justice of the peace may order a defendant imprisoned if his fine is not paid: *State v. Sheppard*, 15 Or. 508, applied.

MEANING OF THE WORD "PROCEEDING" CONSIDERED.— An imprisonment for failure to pay a fine is a "proceeding" within the meaning of a section of a city charter providing for "proceedings before the (municipal) court."

MUNICIPAL COURT—STATUTORY CONSTRUCTION.— A provision in a city charter limiting punishment by imprisonment to ninety days does not affect the right of the municipal judge to inflict a fine, the working out of which under the general statutes will keep the offender in confinement longer than the prescribed limit, since in the latter case he is only paying a fine, while in the other case he is being imprisoned as a punishment.

From Multnomah: MELVIN C. GEORGE, Judge.

Chas. McGee having been refused his liberty on a *habeas corpus* proceeding, appeals.

AFFIRMED.

For appellant there was an argument by *Mr. J. R. Cunningham*.

For respondent there was an argument by *Mr. Ralph R. Duniway*.

MR. JUSTICE WOLVERTON delivered the opinion.

The petitioner, Charles McGee, was tried and convicted in the municipal court of the city of Portland on a charge

of violating section 6 of ordinance No. 3983, entitled "An ordinance concerning offenses and disorderly conduct." A fine was imposed of \$200, and in default of payment he was committed to the city prison for 100 days. A writ of *habeas corpus* was thereupon sued out in the circuit court for Multnomah county, resulting in a judgment dismissing the writ, from which he appeals to this court.

The primary question presented for consideration is one of power in the municipal court to commit to prison for a fine imposed as a penalty for the violation of said section, which provides that any person or persons who shall resist any peace officer, etc., "shall, on conviction, be fined not less than twenty-five nor more than three hundred dollars, or shall be imprisoned not less than ten nor more than ninety days, or both, at the discretion of the court." The power of the city council to adopt the ordinance is derived from subdivision 36 of section 36 of the charter of the city of Portland, whereby it is enacted that "the council has power and authority * * * to provide for the punishment of a violation of any ordinance of the city by fine or imprisonment not exceeding three hundred dollars, or ninety days, or both, or by forfeiture as penalty not exceeding three hundred dollars, and for working any such person sentenced to imprisonment upon the streets, parks, public squares, workhouse or house of correction during the term thereof, and to provide for the punishment of any person sentenced to imprisonment who shall refuse to work when ordered." By section 62 it is provided that the "municipal court shall have jurisdiction of all crimes defined by ordinances of the city of Portland, and of all actions brought to enforce or recover any forfeiture or penalty declared or given by any such ordinance"; and further that "the powers, duties and jurisdiction herein conferred upon such municipal court may be exercised by the judge

thereof, who shall likewise adopt a seal"; and by section 65 that "all proceedings before the court or judge thereof, including all proceedings for the violation of any city ordinance, are governed and regulated by the general laws of the state applicable to the justice of the peace or justice courts in like or similar cases, except as in this act otherwise provided": Laws 1893, p. 831. The exceptions referred to have no bearing upon the present controversy.

The authority of the council to enact the ordinance is not questioned, but it is strenuously contended that, the imprisonment being for the purpose of coercing the payment of the fine imposed, the council was not empowered to authorize the municipal court to imprison for such a purpose, nor was it so authorized by direct force of the charter. If the court has such authority, it must be by force of said sections 62 and 65 of the charter, as the council has made no attempt to invest it therewith. Turning to the statute governing justices of the peace in criminal actions, we find by section 2131, Hill's Ann. Laws, that such an action is commenced and proceeded in to final determination, and the judgment therein enforced, in the manner provided in the Code of Criminal Procedure, except as otherwise provided. By the Code of Criminal Procedure (section 1408, Id.) it is provided as follows: "A judgment that the defendant pay a fine must also direct that he be imprisoned in the county jail until the fine be satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every two dollars of the fine; and in case the entry of judgment should omit to direct the imprisonment, and the extent thereof, the judgment to pay the fine shall operate to authorize and require the imprisonment of the defendant until the fine is satisfied at the rate above mentioned." Construing these sections in *pari materia*, as it was in-

tended they should be, the justice of the peace is authorized to impose a fine and direct that the accused be imprisoned until the fine is satisfied, specifying the extent of imprisonment, not to exceed one day for every two dollars of the fine; but if he should omit the direction for the imprisonment, yet the judgment itself operates to authorize and require the imprisonment until such fine be satisfied at the specified rate per diem. This result is deducible from *State v. Sheppard*, 15 Or. 598 (16 Pac. 483). So that the authority of a justice of the peace to enter such a judgment in a criminal action, and the effect of a judgment rendered by him imposing a fine, are clear; and we are now to inquire whether the municipal court is clothed with like power, in proceedings for the violation of a city ordinance, or its judgment imposing a fine is effective for a like purpose. The language of section 65 of the charter is explicit: "All proceedings before the court or judge thereof, including all proceedings for the violation of any city ordinance are governed and regulated by the general laws of the state applicable to the justice of the peace or justice's court in like or similar cases."

The word "proceedings" is evidently used here in its broadest signification. "Proceeding" is defined by Black as follows: "In a general sense, the form and manner of conducting judicial business before a court or judicial officer; regular and orderly progress in form of law; including all possible steps in an action, from its commencement to the execution of judgment. In a more particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object." Black, Law Dict. Bouvier defines it thus: "In its general acceptance, this word means the form in which actions are to be brought and defended,

the manner of intervening in suits, of conducting them, of opposing judgments, and of executing them." Bouv. Law Dict. DUER, J., in *Rich v. Husson*, 1 Duer, 617, which involved the right to costs and amount of recovery, says: "The word 'proceeding,' both in its popular use and in its technical application, has a definite meaning, which we cannot alter or enlarge. It means, in all cases, the performance of an act, and is wholly distinct from any consideration of an abstract right. A proceeding in a civil action is an act necessary to be done in order to attain a given end. It is a prescribed mode of action for carrying into effect a legal right, and, so far from involving any consideration or determination of the right, presupposes its existence. The proceeding follows the right.

"The rules by which proceedings are governed are rules of procedure; those by which rights are established and defined, rules of law. It is law which gives a right to costs, and fixes their amount. It is procedure which declares when and by whom the costs to which a party has a previous title shall be adjusted or taxed, and when and by whose direction a judgment in his favor shall be entered." In *Wilson v. Allen*, 3 How. Prac. 369, the court being authorized at any time, in furtherance of justice, to amend any pleading or proceeding by correcting a mistake in any respect, it was held that the use of the term "proceeding" in that connection authorized the allowance of an amendment of an undertaking on appeal. So, in *Langstaff v. Miles*, 5 Mont. 554 (6 Pac. 356), it was held, under a similar statutory authorization, that the court was empowered to allow an amendment of an undertaking for an attachment. So, in *Reg. v. London, C. & D. Ry. Co.*, L. R. 3 Q. B. 170, it was held that the taxation of costs was a proceeding within a statute which provided, in effect, that, from and after the passing of a

certain act, no actions, suits, attachments, executions, or other proceedings against a railroad company therein named should be commenced or continued. And in *Smith v. Bank*, 5 Pet. 518, and *Ward v. Cohen*, 3 S. C. 338, it is said that proceedings of the sheriff under execution are part of the proceedings in the cause. For other cases illustrating the application, import, and general scope of the term, see *Hine v. Belden*, 27 Conn. 384; *Williamson v. Champlin*, Clarke, Ch. 9; *Bonesteel v. Orvis*, 31 Wis. 117; *Hogan v. Hoyt*, 37 N. Y. 300.

As it pertains to a justice's court, the law gives the authority to impose a fine in a criminal action; but, from the foregoing authorities, the manner of judgment, how it shall be entered and the fine enforced, is but procedure; and this embraces the imprisonment, either by virtue of the express direction of the judgment, or by force of the statute, if such direction be omitted therefrom. As was said in *State v. Sheppard*, 15 Or. 598 (16 Pac. 483), quoting from *Ex parte Kelly*, 28 Cal. 415: "The imprisonment is no part of the punishment, *per se*, but is merely one of the modes by which the law enforces the satisfaction of the fine, which is in itself the punishment or a part of it." The Portland city charter has within itself prescribed no code of procedure in cases of the violation of its ordinances, but has referred the municipal court, for its direction and guidance, to the proceedings provided by the general laws of the state by which the actions of the justice of the peace are regulated and governed in like or similar cases. Looking to such general laws, it is ascertained how a criminal action is begun, and what each succeeding step shall be, to and including the entry of judgment and its enforcement. As the entry of the judgment and the manner of its enforcement are proceedings in a criminal action before the justice of the peace, under the general law, it is quite clear that, when

the charter prescribed that all proceedings for the violation of any city ordinance shall be regulated by the general laws applicable to justices' courts in like or similar cases, it was intended to embrace those particular proceedings, and hence that the municipal court had the right to imprison in default of the payment of the fine imposed.

It is insisted, however, that inasmuch as said subdivision 36, § 36, of the charter limits the power of imprisonment by the municipal court to ninety days, the commitment of the accused for one hundred days was in violation of such regulation. We have anticipated this proposition somewhat by previous considerations. *State v. Sheppard*, 15 Or. 598 (16 Pac. 483), was a case wherein the justice of the peace imposed a fine for an assault under a statute which authorized the justice to punish by fine only, but he entered a judgment directing imprisonment until such fine and costs should be paid at the rate of one day for each \$2 of such fine and costs. The judgment was held to be without the jurisdiction of the justice as it pertained to the costs, but not as it pertained to the direction for imprisonment. Mr. Chief Justice LORD, speaking for the court, said: "The true intent and purpose of section 1408 being not to pronounce imprisonment as the punishment, but as a means of coercing the payment of the judgment for a fine for an assault and battery under subdivision 6, § 2052." The imprisonment is merely a prescribed mode of enforcing the payment of the fine, and, as we have seen, constitutes a step in the code of criminal procedure to be pursued in all cases involving the imposition of a fine. The punishment permitted by the charter and fixed by the ordinance is imprisonment or fine, or both. All beyond is mere mode or manner of enforcement. The first can only be satisfied by serving out the prescribed term in prison, while

the latter may be satisfied by payment of the fine imposed; but for the coercion of that payment the statute has prescribed a mode of procedure, which is to commit the accused to prison for a term not exceeding one day for every \$2 of the fine. The mode and manner of enforcing the punishment should not be confounded with the punishment itself, or regarded as a part of it; and, if this obvious distinction is kept in view, the power of the court to direct imprisonment under the statutory regulations for the coercion of the payment of the fine becomes clear and incontrovertible: *Ex parte Kelly*, 28 Cal. 415. These considerations affirm the judgment of the court below, and it is so ordered.

AFFIRMED.

Decided 30 April, 1898.

FIRST NAT. BANK v. FIRE ASSOCIATION.

FIRST NAT. BANK v. AACHEN INS. CO.

[53 Pac. 8; 50 Pac. 568]

1. EXPERT AND OPINION EVIDENCE DISCUSSED.—The character and variety of expert evidence is here discussed, and the exceptions to the general rule fully explained. *Fisher v. Or. Short Line Ry. Co.*, 22 Or. 533, and *Nutt v. Southern Pac. Co.*, 25 Or. 291, cited.
2. EXCEPTION TO RULE ON OPINION EVIDENCE.—A skilled witness may be allowed to add his opinion as to the conclusion to be drawn from certain facts and circumstances which have come under his personal observation, where they are otherwise incapable of being detailed and described so as to enable anyone but the observer himself to form an intelligent conclusion from them, although the matter referred to is not of itself a proper subject of expert testimony.
3. *IDEM*.—Under this exception it is competent for skilled firemen, in connection with their descriptions of a fire, to state whether or not in their opinion it was burning naturally or whether some inflammable substance had been distributed about the premises.
4. SUBJECT OF EXPERT TESTIMONY.—Whether or not a fire in a certain store stocked with certain goods could have spread to the upper floor of the building within a given time, and whether under the given circumstances and within a certain time it would have generated sufficient explosive power to blow open doors, etc., is a proper subject of expert testimony.
5. EVIDENCE OF MOTIVE FOR INCENDIARISM.—Though the pleadings admit that the insured sustained a loss exceeding the amount of insurance, yet it is com-

33	172
333	196

33	172
41	267

33	172
42	233

petent to show that the stock was old and undesirable as a motive for burning it.

6. **SETTING ASIDE VERDICT—INSUFFICIENCY OF EVIDENCE.**—A verdict will not be disturbed on appeal if there was any evidence to support it: *Wallace v. Suburban Ry. Co.*, 26 Or. 174; *Van Bibber v. Plunkett*, 26 Or. 562, and *State v. Pomeroy*, 30 Or. 797, applied.
7. **TRIAL—FAIRNESS OF INSTRUCTIONS.**—A statement by the judge, preliminary to his instructions, that the parties had agreed on the law of the case, and that he would give certain instructions presented by defendant, does not give undue prominence to defendant's case.
8. **DIFFERENT DEGREES OF PROOF—CIVIL AND CRIMINAL CASES.**—In an action on a policy of insurance where the defense is arson by the insured it is not improper for the court to point out to the jury the difference between the degrees of proof required in civil and criminal cases, and state that in a civil case there is no question whether a crime has been committed, and that a verdict for either party could not be used against the other in any criminal prosecution—such statements are intended merely to caution the jury against allowing the criminal phase of the case to influence their verdict.
9. **MISLEADING INSTRUCTION.**—An instruction is not erroneous because it uses unusual or peculiar references for illustration if it is not calculated to mislead an intelligent jury.
10. **MOTION FOR VERDICT IS A DEMURRER TO THE EVIDENCE.**—A request to direct a verdict is equivalent to a demurrer to the evidence, and a review thereof is governed by the rules applicable to a motion for nonsuit.
11. **SUFFICIENCY OF BILL OF EXCEPTIONS—NONSUIT.**—The supreme court will not review a refusal to direct a verdict or a nonsuit unless the bill of exceptions affirmatively shows that it contains all the evidence given at the trial by the party carrying the burden of proof. A bill of exceptions properly framed to present the exceptions reserved during the trial would still not be sufficient to present the ruling on motion for verdict or nonsuit unless it contained all the testimony: *Coffin v. Hutchinson*, 22 Or. 554; *Johnston v. Or. Short Line Ry. Co.*, 28 Or. 94, and *Schaefer v. Stein*, 29 Or. 147, followed.

From Multnomah: E. D. SHATTUCK, Judge.

Consolidated actions by the First Nat. Bank of Portland against the Fire Association of Philadelphia and the Aachen and Munich Fire Insurance Company, on certain assigned policies of fire insurance issued to H. Wolf and Bro. Judgments for defendants from which plaintiff appeals.

AFFIRMED.

Before the hearing of the case respondents filed a motion to strike from the files a transcript of the entire testimony that was attached to the bill of exceptions.

MOTION OVERRULED.

For appellant there was a brief over the names of *Henry E. McGinn* and *Dolph, Mallory & Simon*, with an oral argument by *Mr. McGinn*.

For respondents there was a brief over the name of *Cox, Cotton, Teal & Minor*, with an oral argument by *Mr. William W. Cotton*.

MR. JUSTICE WOLVERTON delivered the opinion.

These actions are based upon certain policies of insurance against loss and damage by fire, and were tried together. The defense is single, and is, in effect, that the policy holders set or caused fire to be set to the property covered by the policies. The verdict and judgment were for the defendants, and plaintiff appeals.

The questions most difficult of solution arose from the examination of the witnesses David Campbell, M. Lau-denklos, A. E. Austin and George H. Wemple. Campbell testified, among other things, as follows: "I was in front of the building. Should judge the flames coming out of each of the two stories were five or six feet, covering the whole space, upstairs and downstairs. I could not say whether the glass from the windows and doors upstairs and downstairs was all gone out or not. I would judge it was, because of the character of the smoke and flames across the street. * * * The fire seemed to be burning very rapidly. I should judge that it originated in the southeast corner of the store. The flames were sweeping the whole length of the store, and escaping from the front. From the time I heard the alarm until I got there was between three and four minutes. * * * I went through the door behind the stream of water. * * * When I first got in there was a great deal of

fire burning. It was burning very fiercely. All the goods seemed to be on fire. There wasn't much wood-work burning, except the roof." Laudenklos: "The only thing I could see was a mass of flames. It was escaping from the store from the first story and the second story,—from both stories; the whole of the frontage. It was a pretty strong flame. There was a great deal of smoke, and a great deal of fire. The smoke was dark. It was not more than usually dark. * * * I entered the building from the front. * * * Went in behind the water. There was a volume of flames in there. The whole of it seemed to be in flames. The fire was intense. It had covered the whole lower floor, * * * burning about the same all over. * * * I took notice of how the clothing was burning * * * when I got upstairs. It was all piled up on the counters or tables, as you call them,—piled in rows,—and the outside edges were burned off, and * * * a little on top. Did not pay much attention to whether that was uniform all over the building: * * * It was all about burned alike, that I seen of it. * * * We * * * were not longer than five minutes in getting to the fire after the alarm." Austin: "We got to the fire about two minutes after we got this alarm. * * * The flames on the lower floor poured out across the street. * * * Just before we got to Ash street, on Front, the windows blew out, and the smoke and flames came out of the upper windows almost as far out as the ones on the lower floor. They reached almost half way across the street,—fifteen or twenty feet from the building. Before we got in the building the lower windows were broken. * * * They broke just after we turned on Front street. The smoke and flames were pouring out when we turned into Front street. We saw the windows come out upstairs. We could hear the windows break as they came out. Well,

the windows went out about as you would confine gas or any hot thing to break a window. They go off with a kind of dull report. * * * The fire was burning all over the entire lower floor, so far as I could see, and the upper floor I should judge to be in the same condition. The flames were coming out in as great volume upstairs as below ; all over the store generally about the same ; pouring out of all the openings upstairs and down." And Wemple, among other things, as follows : " I traveled as fast as the horse could go, and from the time I heard the first stroke of the bell until I got to the fire, I should say, two or three minutes. When I arrived there, the smoke and the blaze was coming out of the upper windows, and down below. * * * The fire was burning all over. There seemed to be fire all over everywhere. I could not say whether the fire was burning uniformly or not. It was burning everywhere.'"

The assignments of error, covering the matters objected to, as they concern these witnesses, are numbered from 2 to 13, inclusive ; and we will recite such of the interrogatories in their order, together with the answers thereto, as may be deemed pertinent to a clear understanding of the questions involved, and the opinion of the court touching them : (2) Question. (To Campbell.) " I will ask you to state, from your experience as a fireman, and from what you observed in regard to this fire, whether or not, in your opinion, this fire was burning naturally on material that it had to feed upon, or whether, in your opinion, something of an inflammable character had been distributed, to accelerate the fire, and give it some better food than the merchandise naturally would that was burning?" Answer. " It was my opinion that the fire was an incendiary fire." (3) Q. " I will ask you if you have ever known of any other fire, that you have had experience with, in cotton or woolen

goods, of the combined texture of cotton and wool, to burn naturally as this fire burned." A. "No; I do not know as I have." (4) Q. (To Laudenklos.) In effect, the same as 3. (5) Q. "Supposing the hatch over the elevator had been closed, do you think the fire could have started below, and have gotten up and spread up the upper floor as rapidly as it did, having only the stairway as a means of getting in the upper story, if it had been a fire burning from natural causes?" (6) Q. (To Austin.) "I will ask you to state, from your experience as a fireman, whether or not a fire burning naturally, without any substance which would have a tendency to create gas, would gather sufficient force within a building to blow the windows out." A. "Well, I think, in time, it would. The hot air and the gasses from any burning substance at all will eventually accumulate enough gas to blow out an ordinary window, in time, with extreme heat." (7) Q. "What do you say in regard to the capability of a fire burning on the lower floor of this store, in which was contained clothing, consisting of wool and cotton, and a mixture of both wool and cotton, samples, suspenders, and collars, being able to generate sufficient power to open the iron doors and windows, which were situated on the rear end of that building, without the presence of some material which would have a tendency to generate more gas or explosive force than this property naturally would in burning?" (8) Q. "If those doors and windows had blown out, say, within three minutes after the fire started, what would you say?" (9) Q. (To Wemple.) The same in purport as No. 2. (10) Q. The same in purport as Nos. 7 and 8. (11) Q. "I will ask you to state, from your experience as a fireman, answering now from your own knowledge and observation, whether or not it is your opinion that this

fire originated and burned from natural causes, or was an incendiary fire,—burning upon some inflammable material which had been distributed in the store for the purpose of accelerating and aiding the fire?” A. “I could not say. I did not investigate it. The fire was out of my district. I had no chance to investigate it.”

(12) Q. “I speak now from your own observation of the conditions there. Do you say, from your observation of the conditions there, and from your knowledge and experience as a fireman, that it was burning naturally, as an accidental fire may have started, or was it burning on material contained in the store, without any aid from more inflammable material spread over the store?” A. “No; it could not.” (13) Q. “Or do you say that it was an incendiary fire; that is to say, preparation had been made for it,—material had been laid to help the fire along?” A. “I could not say as to that. Of course, as I said before, it would have had to have had some assistance, in some way, to burn as it did. It might have been gasses of some kind.”

From the nature of the questions put to these witnesses, they may be classified as: (1) Those touching the character of the conflagration,—whether it was such as would naturally result from the burning of the stock of goods known to have been contained in the store, without the aid of more inflammable matter, or whether some substance of a more inflammable nature had been added, which accelerated its action. Nos. 2, 9, 11, 12 and 13 are of this class. (2) Those calling for an opinion of the witnesses as to whether the fire would have spread to the upper floor as rapidly as it did, or have forced open the iron doors and shutters in the rear of the building, if it had been burning from natural causes. Of this class are Nos. 5, 6, 7, 8 and 10. And (3) those which simply called for the experience of the witnesses as to the

appearance of such phenomena at other fires within their knowledge. Of this class are Nos. 3 and 4. It may be premised, in this connection, that the answer to question 2 was not responsive; that questions 3 and 4 elicited nothing of value to either party, and nothing to their prejudice, so they may be dropped from further consideration; and that the answers to question 6 and 11 were unquestionably harmless, assuming that the questions themselves were incompetent. The question for the jury to determine was whether the assignors of plaintiff set or caused fire to be set to the stock of goods, for the injury or destruction of which damages are claimed. The evidence submitted for their consideration was in its nature circumstantial, and the ultimate conclusion was a result to be drawn from inference, and not from matters which within themselves furnished absolute demonstration of the problem. The evidence coming under the first classification is sought to be sustained upon the ground that the phenomenon produced by the burning of the stock of goods was not capable of exact description, so as to produce the same effect upon the minds of the jurors as was produced upon the senses of the observer, and that it was necessary for the observer to supplement his description with an opinion as to how it impressed him, in order to make it intelligibly full and cognizable to the jury; and it is insisted that such an opinion is but an integral part of the observer's narrative of what he witnessed. That falling under the second head, it is urged, was properly admitted as expert testimony.

1. Now as to proposition one. The general rule is that the opinions of witnesses are not evidence, but to this there are two notable and well-established exceptions, both of which are said to rest upon a clear necessity: that is to say, it is only allowable when from the nature of the

case the facts cannot be stated or described in such a manner as to enable those whose duty it is to draw inferences and conclusions therefrom to form an accurate judgment respecting them ; and when no better evidence than such opinions is obtainable. In *Nutt v. Southern Pac. Co.*, 25 Or. 291 (35 Pac. 653, 655), Mr. Chief Justice LORD says : "The necessity for opinion evidence only exists where the facts in controversy are incapable of being detailed and described so as to give the jury an intelligible understanding concerning them ; but when the facts are such as can be detailed or described, and the jury are able to understand them and draw a conclusion from them without such opinion evidence, the necessity for it does not exist." Expert testimony, technically so-called, is employed where a question of science, art, or trade is involved, and the person asseverating is specially skilled therein ; and it is not sufficient to warrant its introduction that the witness may know more of the subject of inquiry, and may better comprehend and understand it, than the jury, but the inquiry must relate to some one of the subjects wherein skill imparts a superior knowledge, which persons of average intelligence may not be presumed to possess. Chief Justice SHAW states the proposition clearly. He says : "It is not because a man has a reputation of superior sagacity and judgment and power of reasoning that his testimony is admissible. If so, such men might be called in all cases, and advise the jury, and it would change the mode of trial. But it is because a man's professional pursuits require peculiar skill and knowledge in some department of science not common to men in general, which enables them to draw an inference when men of common experience, after all the facts proved, would be left in the dark." *New England Glass Co. v. Lovell*, 7 Cush. 319. The question is quite fully discussed by Mr. Chief Jus-

tice LORD in *Fisher v. Or. Short Line Railway Co.*, 22 Or. 533 (30 Pac. 425), and many authorities are there cited in support of the view here adopted, so that it is unnecessary for us to pursue the matter further. For additional authorities in its support, see *Ferguson v. Hubbell*, 97 N. Y. 507 (49 Am. Rep. 544) ; *Clifford v. Richardson*, 18 Vt. 620 ; *Bradner*, Ev. 358, 359, 368.

2. The other exception relates to the opinion evidence of nonexperts, or witnesses testifying respecting facts which men in general are as well equipped, qualified, and capable of comprehending and understanding as they, and is quite as well established as the exception heretofore discussed. It is said in *Com. v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401 : "The exception to the general rule that witnesses cannot give opinions is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill, or learning, but includes the evidence of common observers, testifying to the results of their observation made at the time in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury." Mr. Justice MITCHELL, in *Graham v. Pennsylvania Co.*, 139 Pa. St. 158, (21 Atl. 151, 12 L. R. A. 298) says : "That the opinions of witnesses are in some cases admissible as evidence, even when not coming properly under the head of expert testimony, has long been established in practice." Further on he asserts that the cases which support the doctrine "may be said not only to have become legion, but legion against legion," which would indicate that in his opinion their application has become confusing, while the principle is always recognized. There are several reasons assigned which characterize its competency, among which may be enumerated its necessity as being the only method of

proving certain facts essential to the due and proper administration of justice ; that it is not a mere opinion, but a conclusion of fact to which the judgment and common knowledge of the observer has led him in regard to the subject matter ; and that certain facts are of such a nature that whatever a witness may affirm touching them he asserts largely as an opinion, but so blended with knowledge and recollection that the line where opinion ends and fact begins cannot be distinguished, making it, in effect, a compound question of fact and opinion.

The conditions which attend its admissibility are that the opinion shall be given in connection with a narration of the facts and circumstances upon which it is based, so far as it is practicable, that the necessity for its expression may be made apparent, as well as an aid to the jury in determining what weight ought to be given it ; and the facts which form the basis of the opinion must be such as are within the common understanding of persons in general, without special skill or knowledge. A practicable statement of the rule, or, rather, the exception, is as follows : Where the witness has had the means of personal observation, and the facts and circumstances which led the mind of the witness to a conclusion are incapable of being detailed and described so as to enable anyone but the observer himself to form an intelligent conclusion from them, the witness may be allowed to add his opinion or the conclusion of his mind. This is, in effect, the holding in *Town of Cavendish v. Town of Troy*, 41 Vt. 99. In further support thereof, see *Underh. Ev.* 268, 269 ; *People v. Hopt*, 4 Utah, 247-253, (9 Pac. 407) ; *Underwood v. Waldron*, 33 Mich. 232 ; *Porter v. Pequonnoc Manufacturing Co.*, 17 Conn. 249 ; *Clinton v. Howard*, 42 Conn. 294-306 ; *State v. Folwell*, 14 Kan. 105-110 ; *Yahn v. City of Ottumwa* (Iowa) 22 Am. Law. Reg. (N. S.) 644, and extended

note by Lawson (s. c. 15 N. W. 257); *Sears v. Seattle St. Railway Co.*, 6 Wash. 227, (33 Pac. 389, 1081); *Innis v. The Senator*, 4 Cal. 5 (60 Am. Dec. 577); *City of Indianapolis v. Huffer*, 30 Ind. 235; *Stewart v. State*, 19 Ohio, 302 (53 Am. Dec. 426).

3. The witnesses were regarded by the court below as skilled firemen, and were permitted to testify as competent experts concerning matters falling within the line of their vocation. In so far as the action of the trial court is disclosed by the record, it finds support in *Pendleton v. Saunders*, 19 Or. 9 (24 Pac. 506), and in the discussion contained in the opinion touching who are experts, competent to testify as such. These witnesses were able, perhaps, to describe the phenomenon in a general way, as it was impressed upon their senses by observation (that is, as it appeared to them at the time), and yet they believed it was not burning naturally upon the combustibles known to have been contained in the store. They described it as intense, burning fiercely everywhere, both upstairs and down, the flame pouring out of all the doors and windows, etc.; but it was impracticable for them to denote the degrees of intensity which would attend fires burning upon substances of different degrees of inflammability. It was the theory of defendants that some inflammable drug or substance had been distributed about over the goods, which greatly accelerated their burning, and this was a circumstance which was for the consideration of the jury in their determination of the question whether either of the partners set or caused fire to be set to the stock. The only available evidence by which to determine that supposed fact was the manner in which the fire burned, and the effort was to produce a like effect upon the jury as the phenomenon produced upon the unlookers, who were in a condition and capacitated to acquire a knowledge thereof. We have a case,

therefore, not of unskilled, but of skilled, observers narrating the facts so far as they were able, and giving their impressions concerning them. In our opinion, the rule governing as to the first classification is aptly stated by EARL, J., in *Ferguson v. Hubbell*, 97 N. Y. 507 (49 Am. Rep. 544). He says: "Opinions are also allowed in some cases where from the nature of the matter under investigation, the facts cannot be adequately placed before the jury so as to impress their minds as they impress the mind of a competent, skilled observer, and where the facts cannot be stated or described in such language as will enable persons not eyewitnesses to form an accurate judgment in regard to them,—no better evidence than such opinion is attainable."

In *Stewart v. State*, 19 Ohio 302 (53 Am. Dec. 426), it is said that questions of time, quantity, number, dimension, height, speed, distance, and the like, are issues concerning which it is proper to take the opinion of witnesses; and in *State v. Folwell*, 14 Kan. 105, it was held that duration, distance, dimension, velocity, etc., are often to be proved only by the opinions of witnesses, depending as they do on many minute circumstances, which are not susceptible of being fully and intelligently detailed. In *Clifford v. Richardson*, 18 Vt. 620, the court say: "It often happens that the triors are not qualified, from experience in the ordinary affairs of life, duly to appreciate all the material facts, when proved. Under these circumstances, the opinions of witnesses must of necessity, be received." The case of *Improvement Co. v. Coon*, 10 Wkly. Notes Cas. 502, cited in *Graham v. Pennsylvania Co.*, is much in point, wherein it seems to have been held that the opinions of witnesses as to the violence and unusual character of a storm were certainly necessary to supplement their descriptions. All the elements would seem to concur in making the opinions of the witnesses

above named, skilled as they were considered to be by the court below, competent to express an opinion touching the question whether the fire was burning naturally and alone upon the combustibles known to have been contained in the store. The jurors cannot be presumed to have known as much touching the characteristics of fires as those who have had much experience and training in extinguishing them, and who have had occasion to observe many of them, with a knowledge of the substance which gives them action. It was not a question of whether the fire was of an incendiary origin, respecting which the opinions of the witnesses were called, for that was the ultimate question, but whether the fire was burning naturally upon the known substance it had to feed upon, and we think such opinion evidence was competent.

4. The questions whether the fire could have spread to the upper floor in so short a time, or whether it would have generated sufficient explosive power to have blown out the doors, etc., comprised in the second classification, called for the opinions of experts, and were proper subjects of inquiry, in the light of the surrounding facts and circumstances. Much of what has been said heretofore touching the necessity for the species of testimony known as "opinion evidence" is applicable here.

During the course of the trial, A. R. Ockerman, a druggist of admitted capacity, was asked whether there existed fluids or solids of an inflammable nature, capable of being disposed of over a stock of goods such as was carried by H. Wolf & Brother, which would produce no odor in burning, to which objection was made upon the ground that no testimony had been introduced to show that any such material had been used, upon which to base the question. The bill of exceptions does not indicate what had or had not been shown touching the sub-

ject, except as reference may be made to the testimony of Campbell, Laudenklos, Austin, and Wemple. But the summary of their testimony seems to have been given only for the purpose of testing the propriety of certain questions put to them, which have been heretofore discussed, so that we cannot say whether the point was well taken or not. If reference is made, however, to the testimony which is attached to the bill of exceptions, it will be found that the court below overruled the objection, upon his recollection that there was evidence in the record tending to show that no odor was emitted or perceptible from the burning substance.

5. Another assignment is stated thus: "It being admitted by the pleadings that H. Wolf & Brother sustained a loss of \$31,174.73, being \$3,174.73 in excess of the amount of insurance had by H. Wolf & Brother thereon, it was error for the court to admit evidence depreciating the value of the stock." The question arose upon the testimony of S. Friedman, which was to the effect that he had examined the stock; that two-fifths of it was good stock, worth 100 cents on the dollar, and three-fifths of it was old stock. The purpose of this testimony was not to show that H. Wolf & Brother had not suffered loss to the amount admitted by the pleadings, but to show the nature of the stock on hand,—whether it was a desirable one or not,—in order to establish a motive in the owners for its destruction. It was a circumstance of some bearing upon the alleged fraud, and was not improperly admitted.

6. The next question presented is whether the court should have instructed the jury, in compliance with plaintiff's motion interposed at the close of defendants' case, to return a verdict for plaintiff in the amount

prayed for, upon the ground that no evidence had been adduced connecting H. Wolf & Bro. with the burning of their stock. That there was no direct evidence of the explicit fact of firing the goods, implicating the proprietors, none can gainsay; but the question here is whether there was any evidence, direct or circumstantial, sufficient to go to the jury, from which they could fairly infer the fact at issue. If so, the question was for the jury, and the court could not invade its province by directing them to bring in a certain kind of verdict. There was testimony to the following effect: Marcus Wolf, one of the proprietors, and Jake Wolf, a son of the other coproprietor, had been about the store all day. Jake left, to go to his home, at about 5:45 or 5:50 p. m., and Marcus and the bookkeeper about a quarter of an hour thereafter, the bookkeeper locking the store as they went out. Within five minutes after their departure the store was discovered to be on fire in both stories, and almost immediately the iron doors and shutters on the lower floor burst out, with an explosion, and the window lights in all the doors and windows were broken, and the fire burned with unusual fury. Immediately after it had been extinguished, Marcus Wolf telegraphed to his brother Harry, who was then in New York for the purpose of replenishing their stock: "Store burned up. Total loss. Stop buying. Come home." For the purpose of showing a motive, evidence was adduced tending to show that the stock of goods on hand was in some respects unsalable and undesirable, that times were somewhat depressing, and that they were financially involved to the extent of some \$50,000. These references indicate the most marked characteristics of the testimony, while there was much more having the same tendency. This testimony was pertinent to go to the jury, and was of a character from which they might infer, as they did, that the fire

was of incendiary origin, and that Marcus Wolf was responsible for its inception. It is not for us to say what we would have done if we had been sitting as jurors, but to determine whether there was any evidence competent to go to the jury, and from which the jury might have drawn the inference evidenced by their verdict. Mr. Justice Woods, in *Bayly v. London Insurance Co.*, 2 Fed. Cas. 1087 (a case of similar import), says: "Even were I convinced that the proof sustained the charge, it would not be my province to set aside the verdict of the jury because I disagreed with them." In support of the view we here entertain see *Wallace v. Suburban Railway Co.*, 26 Or. 174 (37 Pac. 477); *Van Bebber v. Plunkett*, 26 Or. 562 (38 Pac. 707); and *State v. Pomeroy*, 30 Or. 16 (46 Pac. 797).

7. As a preliminary to the court's instructions to the jury, it made use of the following language: "The counsel almost entirely agree, the one with the other, as to what is the law in the case. Counsel for the defendant has presented certain written instructions which he desires shall be given to the jury. These instructions I have considered, and they seem to me to embrace the law of the case. I will therefore read these instructions, and you will consider them your guide in regard to the matters referred to therein." Objection is made to the latter clause, as giving undue prominence to defendants' case, at the expense of plaintiff's legal rights. We do not think the language is susceptible of that interpretation, as it was merely employed as introductory to the rendering of the instructions drafted by defendants' counsel.

8. The court further instructed the jury, among other things, as follows: "In deciding upon the issues in this case, the jury must take into account every fact and in-

cident detailed in the evidence before them, and decide according to what is considered the most probable conclusion. The rule in civil cases, like the present, is different from what it is in criminal cases. In criminal cases the question is as to the guilt or innocence of crime, and there the jury must be satisfied that the offense was committed, beyond a reasonable doubt, by the person accused. In criminal cases, if any reasonable doubt remains in the minds of the jury they are bound to give the accused the benefit of such doubt. But in civil cases, like the present, there is no question whether any crime has been committed. If there are any criminal charges to be made in connection with this fire, they are examinable in another department of this court, and you have nothing to do with them. I may add here that the verdict in this case, in whose favor or benefit it may be given, can never be used in any criminal proceeding elsewhere against these parties, if there should be any such proceeding instituted." Exceptions were taken to excerpts from this charge, viz.: (a) "But in civil cases, like the present, there is no question whether any crime has been committed"; (b) "if there are any criminal charges to be made in connection with this fire, they are examinable in another department of this court"; and (c), which goes to the last period of the general instruction just quoted.

It is insisted that, where the facts charged involve moral turpitude, there is a presumption of innocence, which stands as evidence in favor of the party charged, as well as a probability that a man will not commit a crime; that such presumption is to be weighed in civil as well as in criminal cases; and that there can be no preponderance of evidence against the party charged, unless the proof is sufficient to overcome this presumption, together with such other evidence that may have

been offered in support of the innocence of the accused. It is only the natural presumption of innocence, arising from the improbability that a person will commit a crime, not the statutory or legal presumption, which has probative force in civil cases, and this must be taken into consideration with all the other evidence bearing upon the question in determining on which side of the scales of justice the preponderance rests. See *First Nat. Bank v. Commercial Union Assur. Co.*, and *First Nat. Bank v. Phoenix Assur. Co.* (just decided) 52 Pac. 1050. It may have been proper for the court to have given an instruction in these cases similar to the one there given. There was no request for it, however, and we are to determine whether the one given was erroneous. The portion of the charge from the beginning down to and including the first excerpt seems to have been copied from a charge which has received the approval of the court in *Rothschild v. Insurance Co.*, 62 Mo. 356. It must be construed, however, in connection with the whole instruction, and not considered as constituting a single charge within itself. The other excerpts were given with a view to cautioning the jury against allowing the criminal phase of the controversy, or the possible results of any criminal charges that might be preferred against the parties, to influence their verdict in the civil action. These should also be read in connection with the whole charge, and, when so considered, it is highly probable that the jury fully understood its purpose. We are unable to say that the instruction was harmful, and as such improperly given.

9. Exceptions were also taken to certain characteristics of instruction numbered 4, such as the use of Marcus Wolf's name for the purpose of illustrating the meaning of "direct evidence," the use of the expression

“that it was of incendiary origin” to illustrate what is meant by indirect evidence, and the like, for the reason that they were calculated to attract undue attention to the alleged criminality of Marcus Wolf, and its bearing as a feature of the controversy. The instruction is not such a one as should be commended, but, notwithstanding, it states a correct rule of law, and the illustrations were not so peculiar or unwarrantable as to mislead or misdirect an intelligent jury. Seeing no error in the record, the judgment of the court below will be affirmed.

AFFIRMED.

Decided November 1, 1897.

ON MOTION TO STRIKE TRANSCRIPT OF TESTIMONY.

[50 Pac. 568.]

Mr. Lewis B. Cox for the motion.

Mr. Henry E. McGinn contra.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is a motion to strike from the record the transcript of the testimony. The facts material to the inquiry are that the First National Bank, as assignee of H. Wolf & Brother, commenced actions against the Fire Association of Philadelphia, and also against the Aachen & Munich Fire Insurance Company, to recover on account of a loss by fire claimed to have been sustained by its assignors under policies issued to them by said insurance companies. The answers, having admitted the material allegations of the complaints, set up an affirmative matter by way of defense; whereupon the trial court held that the burden of the proof was thereupon cast upon the defendants, and ordered the two causes consolidated for

trial, at which, after defendants had introduced their evidence and rested, counsel for plaintiff moved the court to instruct the jury to return a verdict for their client for the amount demanded in their respective complaints; but, the motion being denied, an exception was saved, and judgment having been rendered against plaintiff for the costs and disbursements of the actions, which were dismissed, plaintiff appeals.

The bill of exceptions contains a synopsis of the important testimony introduced at the trial, and also the following recital: "The entire testimony given in this trial before the court and jury is attached to this bill of exceptions, certified to by F. Harrison as special official reporter, marked 'Exhibit A,' and signed by the judge. It is from this transcript of the testimony that the bill of exceptions was made up, and should there be in the recital of the testimony herein any differences between this testimony and that found in the transcript, so marked 'Exhibit A,' as aforesaid, the testimony as set out in said transcript is to govern." The judge also appended to the transcript of the testimony the following certificate: "The testimony which follows herein, from page 1 to page 242, is all the testimony in the case of *The First National Bank v. The Aachen and Munich Fire Insurance Company*, and is all the testimony in the case of *The First National Bank v. The Fire Association of Philadelphia*, and is referred to in the bill of exceptions in each of said causes as 'Exhibit A,' and is attached to the bill of exceptions in the case of *The First National Bank v. The Fire Association of Philadelphia* only, but is an exhibit in both causes."

10. One of the errors assigned in the notice of appeal is the refusal of the court to instruct the jury to return a verdict in plaintiff's favor for the amount demanded. The

request so to instruct must, in effect, be regarded as equivalent to a demurrer to the evidence, and should be governed by the rules applicable to a motion for a judgment of nonsuit.

11. It has been repeatedly held by this court that the ruling of the court below denying a motion for a nonsuit will not be reviewed on appeal unless the bill of exceptions affirmatively shows that it contains all the evidence given at the trial by the party upon whom the *onus probandi* falls. *Woods v. Courtney*, 16 Or. 121 (17 Pac. 745); *Roberts v. Parrish*, 17 Or. 583 (22 Pac. 136); *Coffin v. Hutchinson*, 22 Or. 554 (30 Pac. 424); *Johnston v. Oregon Short Line Railway Co.*, 23 Or. 94 (31 Pac. 283); *Shmit v. Day*, 27 Or. 110 (39 Pac. 870); *Schaefer v. Stein*, 29 Or. 147 (45 Pac. 301). In the case at bar, the bill of exceptions proper doubtless contains a transcript of sufficient testimony to explain all the exceptions relied upon, except the request so to instruct the jury; and as to that, under the rule heretofore adopted, it was necessary that all the testimony given at the trial should be incorporated in the bill of exceptions, so that this court might be able to consider the questions which the lower court was called upon to decide. The bill of exceptions having been prepared in the prescribed manner, the motion to strike from the record the transcript of the testimony must be denied; and it is so ordered.

AFFIRMED: MOTION OVERRULED.

Argued 6 Oct.; decided 24 October, 1898.

STATE v. BARRETT.

[54 Pac. 807]

HOMICIDE—OPINION EVIDENCE.—The fact that a witness has seen the bodies of several deceased persons in the positions where they fell after being shot does not render him an expert on falling bodies.

OPINION EVIDENCE—TRIAL.—The opinion of a witness that the body of the deceased at the time he saw it did not lie in the position in which it fell when the person was shot is not competent evidence, for it appeared that the position of the body and the surroundings of the place could all be accurately described, and under such circumstances the jury are to draw their own conclusions: *First Nat. Bank v. Fire Association*, 33 Or. 172, distinguished.

WITNESSES—DUTY OF DISTRICT ATTORNEY.—The prosecuting attorney is not required to call as witnesses in a criminal case all the persons present at the commission of the alleged crime, or any particular number of them whose attendance can be procured.

From Multnomah: MELVIN C. GEORGE, Judge.

George Barrett was convicted of manslaughter and appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Wilson T. Hume*.

For the state there was a brief and an oral argument by *Messrs. Cicero M. Idleman*, attorney-general, *Russell E Sewall*, district attorney, and *Roscoe R. Giltner*, deputy district attorney.

MR. JUSTICE BEAN delivered the opinion.

The defendant was convicted of the crime of manslaughter, for shooting and killing one Williams in a saloon conducted by himself and one Levison, and brings this appeal to reverse the judgment. The following statement of the facts will suffice to explain the alleged errors: On the morning of the homicide, in response to

a summons by telephone, Captain Stapleton, of the police force accompanied by an officer, went to the saloon indicated, and there found the defendant, who told Stapleton that he had shot a man, and that his body was then in a back room of the saloon. Stapleton, accompanied by the defendant, went into the room referred to, where they found the body of the deceased stretched out at full length on its back on the floor, in front of the door; the feet about twelve or fifteen inches apart; the hands and arms thrown out on either side about eighteen or twenty inches from the body; and between the right arm and body a Colt's revolver was lying on the floor. After describing the situation and appearance of the body, and the condition in which he found the room, and testifying that he had seen the bodies of two or three persons in the position in which they had fallen after having been shot, Stapleton was permitted, over the defendant's objection and exception, to testify that in his opinion the body of the deceased, at the time he first saw it, did not lie in the position in which it fell when the fatal wound was inflicted; and this ruling is assigned as error. That the admission of this evidence was error can hardly admit of serious doubt. The witness Stapleton was not an expert, if, indeed, the subject was one upon which an expert could have testified. The fact that he had previously seen the bodies of two or three persons after they had been shot would not make him such: *Rash v. State*, 61 Ala. 89.

And the question was not a matter upon which the opinion of a nonexpert is admissible. As a general rule, a witness must testify to facts, and not conclusions or opinions. It is the duty of the jury, and not the witness, to draw inferences from the evidence, and form opinions from the facts presented. The cases in which the opinions of witnesses are allowed constitute exceptions to this

rule, founded on the ground of necessity, because the facts cannot be presented or depicted to the jury precisely as they appeared to the witness, and it is impracticable, from the nature of the subject, for him to relate the facts without supplementing their description with his conclusions: *First National Bank v. Fire Association*, 33 Or. 172 (53 Pac. 8). Such are questions as to the identity of persons or things; the age, health, physical condition, and appearance of a person; the lapse of time; the dimensions and quantities of things; and many other instances in which it is impossible to detail the facts without the use of language which necessarily implies the conclusion or opinion of the witness: Lawson on Expert Evidence, 46; Rogers on Expert Testimony, 6; *Hackett v. Baltimore, etc., Railway Co.*, 35 N. H. 390; *Parker v. Boston, etc., Steamboat Co.*, 109 Mass. 449; *Com. v. Dorsey*, 103 Mass. 412. But the books all agree that such opinion evidence is never admissible if all the pertinent facts can be sufficiently described and detailed to the jury so as to enable it to draw its own inferences and conclusions therefrom: 7 Am. & Eng. Enc. Law, 493, and cases there cited; *Graham v. Pennsylvania Co.*, 139 Pa. St. 149 (12 L. R. A. 293, 21 Atl. 151); *Manufacturer's Indemnity Co. v. Dorgan*, 7 C. C. A. 581 (58 Fed. 945). And this case comes clearly within the latter rule.

This last case (an action on an insurance policy) is very much in point. The dead body of the assured was found lying in a brook, with the face downward, and submerged in six inches of water; and the defense was that he died from disease, and not accident. On the trial the court refused to permit the company to ask of the witness who found the body in the water: "If he had been standing, in your judgment would it have been possible for him to have fallen in the water, in the position in which you found him?" This ruling was sus-

tained by the court of appeals, Mr. Justice TAFT saying the question "asked for an opinion of the witness on facts which it was quite possible for the witness to have detailed to the jury, so that the jury might have drawn its own inference. That there are cases where the judgment of a witness as to distance and other circumstances may be directly asked him, is true, but such questions are not permissible when it is practicable to draw out with exactness the data upon which such judgment must be founded." So, also, in the case at bar there was no difficulty whatever in sufficiently describing the situation and position of the body of the deceased, and the condition of the room in which it was found, to enable the jury to draw its own inference as to whether the body had been moved after having fallen from the effects of the fatal wound, and there was no necessity for supplementing such description by the opinion of the witness upon that question. It was therefore error to permit it to be given, and in view of the fact that the contention of the state throughout the trial was that the homicide occurred in the barroom of the saloon, and that the body had been carried by the defendant and his friends to the back room, and placed in the position in which Stapleton found it before they telephoned for the police, the error cannot be said to have been harmless. The question as to whether the body of the deceased had been moved after the homicide was a very important, if not a vital, question in the case; and it was mischievous error, therefore, to permit the state to throw the weight of the opinion of a witness, and especially one of the standing and character of Stapleton, in favor of its theory. The jurors should have been left to draw their own inferences and conclusions upon this question from the evidence, uninfluenced or unbiased by the opinions of others. For this reason the judgment of the court below must be re-

versed, and a new trial ordered. But as there are other questions in the case, which may arise on another trial, it is thought proper to notice them briefly at this time.

The district attorney having closed the case for the state without calling any of the persons who were in the saloon at the time of the homicide, on the ground that they were the associates and employees of the defendant, and in his opinion their testimony would be unworthy of belief, although one of them was then in custody in default of an undertaking to appear and testify on behalf of the state at the trial, and another was on bail for that purpose, the defendant's counsel moved the court to require such persons to be called as witnesses for the state. The court declined to do so, and the defendant excepted. The parties referred to were then called by the defense, and testified, and the ruling of the court in not compelling the state to produce them on the stand is assigned as error. There is a diversity of judicial opinion as to whether, in a criminal case, the prosecuting officer is compelled to call as witnesses all the persons present at the commission of the alleged crime. There are some early English cases which seem to lay down the rule with more or less distinctness to that effect: *Reg. v. Holden*, 8 Car. & P. 606; *Reg. v. Chapman*, 8 Car. & P. 558; *Reg. v. Stroner*, 1 Car. & K. 650; *Rosc. Cr. Ev.* *139. And in this country it is the rule, in Michigan and Montana, that the prosecuting officer is bound to show the *res gestæ*, or entire transaction, by calling all the obtainable witnesses present at the time, unless it appears that the testimony of those not called would be merely cumulative: *People v. Germaine*, 101 Mich. 485 (60 N. W. 44); *Territory v. Hanna*, 5 Mont. 248 (5 Pac. 250); *State v. Metcalf*, 17 Mont. 417 (43 Pac. 182).

But this doctrine is denied and repudiated, and we think rightfully, by a great majority of the courts in

which the question has come up for adjudication: *State v. Martin*, 2 Ired. 101; *Selph v. State*, 22 Fla. 537; *State v. Eaton*, 75 Mo. 587, 593; *Bozeman v. State*, 34 Tex. Cr. R. 503 (31 S. W. 389); *Kidwell v. State*, 35 Tex. Cr. R. 264 (33 S. W. 342); *Williford v. State*, 36 Tex. Cr. R. 414 (37 S. W. 761); *Morrow v. State*, 57 Miss. 836; *Carlisle v. State*, 73 Miss. 387 (19 South. 207); *State v. Cain*, 20 W. Va. 679. It probably came into use in England at a time when the right of a defendant in a criminal case to be represented by counsel, or to have witnesses appear and testify in his behalf, was either denied entirely, or very much abridged. Under such circumstances, it was, of course, important that the prosecution be compelled to prove the entire transaction, and to call all the witnesses present at the time, whether they would testify for or against the defendant. But these restrictions upon the rights of a defendant do not, and never did exist in this country. Here the right of the accused to appear by counsel, and to have compulsory process for obtaining witnesses in his favor, is everywhere recognized, and generally guaranteed by the fundamental law. There is therefore no necessity for requiring the state to call all the persons who were present when the offense was committed, or any particular number of them. The rights of the defendant are not in any way abridged by a failure to do so. He has the assistance and advice of counsel selected by himself, if able to employ one, and, if not, appointed by the court, and compulsory process for obtaining witnesses at the public expense.

In addition to this, the state is bound to make out its case beyond a reasonable doubt; and if the prosecuting officer does not call sufficient witnesses for that purpose, or if any unfavorable inference can be drawn from his failure to call any witness, the defendant is not likely to suffer by the omission. And if he calls only such wit-

nesses as are favorable to the state, the defendant has a right to call any others which he may suppose will relate the facts favorable to him. It does not seem to us, therefore, that the state should be compelled to call and vouch for a witness, even though it be evident that he knows all about the facts, when the prosecuting officer, acting in good faith, and under his official oath, is of the opinion that he will, by false swearing, or by the concealment of material facts, attempt to establish the innocence of the accused. As said by the supreme court of Missouri in *State v. Eaton*, 57 Mo. 587: "We see no reason why the state's attorney, acting under his official oath, and as much bound, as the representative of the state, to protect the innocent as to bring the guilty to justice, should not be left to his discretion as to what number and character of witnesses he will call for the state to prove an alleged crime against the accused. If others than those called by him know facts favorable to the accused, he may have process to compel their attendance; and, if they come to speak the truth, a cross-examination by the state's attorney can be a matter of no consequence to them."

It is true, the prosecuting officer is supposed to be, and should be, wholly without bias or prejudice. His sole duty is to see that the laws are enforced, and the guilty punished. He is as much bound, as the law officer of the state, to protect the innocent as to punish the guilty; and if, therefore, at any time he should, unmindful of his duty, endeavor to suppress evidence, the trial court would be justified in requiring the production by him of the evidence sought to be suppressed, although it might be more favorable to the defense than to the state. And a refusal to exercise such discretion would probably be ground for reversal. But no such question is presented here. There is no claim that the district attorney was

endeavoring to suppress testimony, or to prevent any or all witnesses present at the time of the commission of the alleged crime from appearing and testifying on the trial. The simple question was whether such witnesses should appear for the state, and thus not only give the defendant the right to cross-examine them, but deny to the state the right of impeaching them if it saw proper, or whether the district attorney might, in his judgment, refuse to call them, and thus compel the defendant to put them on the stand if they were to testify in the case at all. The witnesses were subsequently called by the defense, and testified fully in the case, so that defendant had the full benefit of their testimony, and could not possibly have been injured by the failure of the state to call them in its behalf.

There are some other questions in the case, but as they are of minor importance, and may not arise on another trial, we shall pass without considering them at this time. The judgment of the court below is reversed, and the cause remanded for a new trial.

REVERSED.

Decided 14 September, 1898.

GARNSEY v. COUNTY COURT.

[54 Pac. 539, 1089]

1. **RULES OF COURT—FILING BRIEFS.**—Appellant, having failed to file abstract or brief because the same questions were involved in another case pending on appeal, may, on the other case being dismissed, be relieved from failure to file them as required by the rules of court, and the case be heard on the briefs in the other case and such others as either party may file.
2. **REVIEW TO PROBATE COURTS.**—A county court sitting for the transaction of probate business is an "inferior court" whose proceedings may be examined by a writ of review under Hill's Ann. Laws, § 585 as amended (Laws 1889, 135): *Kirkwood v. Washington County*, 32 Or. 568, approved.
3. **REMEDIAL SCOPE OF WRIT.**—Under Hill's Ann. Laws, §§ 585, 591, providing that a writ of review shall be allowed in all cases where the inferior court appears to have exercised its judicial powers erroneously, or to have exceeded its jurisdiction, to the injury of some substantial right, and that the court

33	201
134	194

33	201
41	537
33	201
44	61
44	82
44	500
33	201
47	206

may affirm, modify, or annul the determination reviewed, the scope of the writ is confined to those cases where jurisdiction has been exceeded, or judicial functions have been exercised in an illegal manner. The writ is still substantially the common law proceeding: *Dayton v. Board of Equalization*, 33 Or. 131, approved.

4. *IDEM*.—A writ of review will not lie to revise the action of a probate court in passing on a claim presented against an estate, provided the proceedings are in due form.

From Klamath: W. C. HALE, Judge.

Writ of review by Cecil J. Garnsey against the county court of Klamath County and its judge to review the action of said court in allowing a certain claim against an estate. The circuit court dismissed the writ, whereupon petitioners appealed. The case was heard on a motion to affirm and on the merits.

AFFIRMED.

For appellants there were briefs over the names of *Reddy, Campbell & Metson*, and *J. W. Hamaker*, with an oral argument by *Messrs. Hamaker and Peter H. D'Arcy*.

For respondent there was a brief and an argument by *Mr. N. B. Knight*, urging, among others, this point.

This is the first time in the judicial history of this state where an attempt has been made to revise or review by writ of review a judgment of a county court in the exercise of its jurisdictional powers as a probate court. Why? Because no lawyer who has any respect for his profession would compromise his reputation by displaying such dense ignorance of the constitution and laws of his state. There can be no writ of review in such cases. The only remedy is by an appeal. The allowance of attorney fees, charges and expenses rests in the sound discretion of the probate court and its judgment in those matters will not be disturbed unless it can be shown it was corrupt. Now the attorney says that while Fred. H. Mills was adminis-

trator and I was his attorney there was no litigation in which the estate was a party. He knows he sued the administrator, Fred. H. Mills, for over \$14,000.00 at the November term, 1891, of the Circuit Court for Klamath County. If there had been a trial of that suit he would have paid the costs. I see he recollects my services to the estate in that suit. "*Haeret lateri lethalis arundo.*" In his additional brief he talks about "multifarious litigation." All lawyers know what a multifarious pleading is in equity, but who ever heard of a multifarious litigation? In his additional brief he calls the order of Judge Moore of July 12, 1895, a *brutum fulmen*, and in his original brief he calls it a *brutem fulmen*. Now what on earth he means by that I don't know. Evidently he is pretending that he knows something about the Latin language. But any tyro in that language would know from the inaptness of the phrases employed that he knew just as much about the Latin language and its appropriate legal and literary uses in the English language as a mule does about music. For the benefit of this attorney let me quote a single line from a great poet:

"A little learning is a dangerous thing."

ON MOTION TO AFFIRM.

MR. JUSTICE BEAN delivered the opinion.

1. In April, 1897, a motion was filed in this court to affirm the judgment of the court below on the ground that the appellants had failed to file an abstract or brief within the time required by the rules of the court. As an excuse for not complying with the rule, the appellants filed an affidavit alleging that the same questions presented in this proceeding were involved in the case of *Knight v. Hamaker*, which had not then been heard, and

asked that in consequence thereof the matter be held in abeyance until the final disposition of the other case. Upon this state of facts the motion was submitted, and has been reserved for further consideration until this time. The case of *Knight v. Hamaker* having now been disposed of without a consideration of the merits, 33 Or. 154 (54 Pac. 277), it is deemed best to deny the motion to affirm in this case, and to direct that the appellants be relieved from filing either an abstract or brief, and that the case be set down for an early hearing on the briefs filed in the Hamaker appeal and such additional briefs as either party may desire to file; and it is so ordered.

MOTION DENIED.

ON THE MERITS.

MR. JUSTICE BEAN delivered the opinion.

This is an appeal from a judgment of the Circuit Court of Klamath County dismissing a proceeding by writ of review brought for the purpose of reversing and annulling a decree of the county court made in the Matter of the Estate of W. H. Mills, Deceased, directing the administrator thereof to pay N. B. Knight \$1,329 for fees and expenses incurred by him as the attorney for a former administrator of such estate. The petition for the writ, after describing the proceedings of the county court, alleges that the court exceeded its jurisdiction, and exercised its judicial functions erroneously, to the injury of plaintiffs, and asserts that such proceedings are erroneous and void: "First, because the said claim of N. B. Knight is not a proper claim or charge against the estate of said decedent, but is a claim for legal services rendered to the said Fred. H. Mills in his individual capacity, and not as

administrator, and is for services not in the care and management, but against the interest, of said estate, all of which will more fully appear by the records of the proceedings in said county court in the matter of said estate; second, because the said claim is presented as a claim for expenses of administration, and not a claim for a debt contracted by decedent in his lifetime, and can only be allowed upon final accounting of said estate; third, because there has never been a final account of the administration of said estate, and the said claim is open to objection by any party interested in said estate, until the filing and settlement of such final account; fourth, because it appears from said pretended claim of said N. B. Knight that said services had not been fully rendered, and the same was examined and allowed by the said administrator before said services had been rendered."

2. It is contended by the defendants that the judgment of the court below should be affirmed for the reason that a county court, sitting for the transaction of probate business, is not an inferior court, within the meaning of the law authorizing the proceedings in such a tribunal to be examined on writ of review. But this question is settled by the decision in *Kirkwood v. Washington Co.*, 32 Or. 568 (52 Pac. 568) where it is said that "all courts and tribunals over which the circuit courts are given appellate jurisdiction and supervisory control by the constitution" are inferior courts or tribunals, within the meaning of the statute referred to.

3. But it by no means follows from this doctrine that a writ of review under our statute may be used as a substitute for an appeal, or that mere errors of an inferior court or tribunal in determining questions of fact or of law can be corrected by such a proceeding. The statu-

tory writ of review is substantially the common-law remedy of certiorari, with some modifications as to when the writ may issue, and the relief which may be granted. At common law certiorari was used, when there was no remedy by appeal or writ of error, to bring the record of an inferior court or tribunal exercising judicial functions before a superior court for the sole purpose of determining from the inspection thereof whether such court or tribunal had acted without jurisdiction, or in excess thereof, or, having jurisdiction, had proceeded illegally and contrary to the course of the common law; and the only judgment which could be rendered was either that the writ be quashed, or that the proceedings be annulled. *Chicago & Rock Island Railroad Co. v. Fell*, 22 Ill. 333. Under the statute, the fact that the right of appeal exists is no objection to the issuance of the writ. Hill's Ann. Laws, § 585. And in such proceeding the court has power to affirm, modify, reverse or annul the determination reviewed, and, if necessary, award restitution to the plaintiff; or, by mandate, direct the inferior court, officer, or tribunal to proceed in the matter reviewed according to its decision. Hill's Ann. Laws, § 591. But the statute does not materially enlarge the scope of the writ, or substantially change its character or purpose. *Dayton v. Board of Equalization*, 33 Or. 131 (50 Pac. 1009, 1012); *Cal. & Oregon Land Co. v. Gowen*, 48 Fed. 771. It may issue when there is a right of appeal, but it is expressly limited to cases where the inferior court, officer or tribunal, in the exercise of judicial functions, appears to have exercised such functions erroneously, or to have exceeded its jurisdiction, to the injury of some substantial right of the petitioner, and not otherwise. Hill's Ann. Laws, § 585. In other words, the writ will lie in two classes of cases: First, whenever the inferior court or tribunal has exceeded its jurisdiction; and, second, whenever it has

exercised its judicial functions erroneously (that is, illegally and contrary to the course of procedure applicable to the matter before it); and this is substantially the common law rule. Its object, under the statute, as at common-law, is to keep inferior courts and tribunals within the bounds of their jurisdiction, and compel them to proceed regularly in the disposition of matters brought before them for determination; but it cannot be used as a substitute for an appeal, nor does it lie to correct mere errors in the exercise of rightful jurisdiction, or to inquire whether the rulings of the inferior tribunal upon the law and the evidence, and in the application of the law to the facts, are correct. 2 Spell. Extr. Relief, § 1891; 4 Enc. Pl. & Prac. 90, 98, 256; *Ennis v. Ennis*, 110 Ill. 78; *Hamilton v. Harwood*, 113 Ill. 154; *People v. Dwinelle*, 29 Cal. 632; *Central Pac. R. Co. v. Board of Equalization*, 46 Cal. 667; *Alexander v. Municipal Court*, 66 Cal. 387, (5 Pac. 675); *Tiedt v. Carstensen*, 61 Iowa, 334 (16 N. W. 214); *Lewis v. Larson*, 45 Wis. 353.

4. Now, in this case there is no pretense that the county court of Klamath County did not have jurisdiction to pass upon the legality of Knight's claim, or that its proceedings in relation thereto were not in due form. But the contention is that it erred in deciding the claim valid as against the estate. This was a question which it was authorized to decide, and its conclusion, however erroneous, cannot affect its jurisdiction, or the regularity of its proceedings, and hence presents no question for determination on a writ of review. If the position of the petitioners is correct, the writ becomes a concurrent remedy with an appeal, and any question of law which can be raised on an appeal can be tried in such a proceeding; but this is manifestly not its object or purpose. It is true, the statute provides that it shall be concurrent with

the right of appeal, but it does not provide that it shall be a concurrent remedy with an appeal. Under the statute, the fact that the right of appeal exists is no objection to the issuance of the writ, if otherwise proper, but it cannot be substituted for a writ of error or appeal. The reason for the amendatory act of 1889 is well known. Prior to that time the course of judicial decisions in this state had not been uniform as to when a writ of review would lie. It was first held to be concurrent with an appeal: *Schirott v. Phillippi*, 3 Or. 484. This was afterwards denied, and it was held that a writ could not issue so long as the right of appeal existed, but that when the time for an appeal had expired it might be issued: *Evans v. Christian*, 4 Or. 375. And finally it was held that the writ would not lie in any case where the right of appeal was given by law: *Ramsey v. Pettengill*, 14 Or. 207 (12 Pac. 439). It was to settle the contradictions involved in those cases that the act of 1889, making the writ of review concurrent with the right of appeal, was passed. But it was not intended to, nor did it in any way, change the scope or effect of the writ, or authorize the determination of any questions in such a proceeding which could not have been tried therein before its passage. It follows from these views that the petitioners have mistaken their remedy, and that the judgment of the court below dismissing the writ must be affirmed.

AFFIRMED.

Argued 5 April; decided 30 April, 1898.

SECURITY SAVINGS CO. v. MACKENZIE.

[52 Pac. 1046]

1. EQUITY JURISDICTION—FORECLOSING BOND FOR DEED.—A court of equity has jurisdiction of a suit to foreclose the interest of an obligee in a bond for a deed of real estate whether the plaintiff is in possession of the property or not, and the provision of Hill's Ann. Laws, § 504, requiring such possession by one seeking to determine an adverse interest in land, is not applicable.
2. IDEM.—A failure to tender performance before suit is no defense to an action by a vendor who has given a bond for a deed of real estate to have the equitable interest of the purchaser barred and foreclosed.
3. TENDER—COSTS.—A failure of a vendor to make a tender of performance before instituting suit to foreclose the equitable interest of the vendee under a bond can only affect the question of costs; and, if such failure is not made a defense, the costs should abide the result.
4. STRICT FORECLOSURE.—Section 414 of Hill's Ann. Laws, providing for sale and redemption of mortgaged realty, has reference only to the foreclosure of liens that are security for debts, and does not apply to a suit to bar the equitable interest of the grantee in a bond for a deed.

From Multnomah: LOYAL B. STEARNS, Judge.

Bill by the Security Savings and Trust Company against William Mackenzie to bar the latter's interest under a certain contract to convey real estate. There was a decree for plaintiff.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Francis D. Chamberlain*.

For respondent there was a brief over the name of *Dolph, Mallory & Simon*, with an oral argument by *Mr. Joseph Simon*.

MR. JUSTICE BEAN delivered the opinion.

This is a suit commenced April 13, 1895, to foreclose the equitable interest of an obligee in a bond for a deed of real estate. The complaint alleges that on October

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136	92
88	209
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f48	132

15, 1894, John Hale and wife, who were then the owners and in possession of the property in question, conveyed the same to the plaintiff, and that it immediately entered into, and ever since has been in, possession, thereof, and that the defendant wrongfully claims an estate therein adverse to the plaintiff, by reason of a bond for a deed executed by Hale and wife to him in July, 1891, whereby they covenanted and agreed to convey the property in question to defendant on payment of the sum of \$2,500 and interest on or before the 1st day of July, 1894, and the performance of certain other conditions; that defendant has not paid such purchase price, or any part thereof, except the sum of \$500, but has made default therein. A copy of the bond is annexed to and made a part of the complaint. It is in the penal sum of \$6,000, and contains the conditions usual in such instruments. The answer denies the possession of the premises by the plaintiff, and, as an affirmative defense, alleges that, immediately upon the delivery of the bond, the defendant entered into and has ever since been in the sole possession of the property; that he has made sundry payments of principal and interest on the bond; and that neither the plaintiff nor the Hales ever demanded from him any money as due on said bond, or ever declared the defendant in default thereon, nor has any suit ever been instituted to foreclose said bond or defendant's interest in said land. A reply having been filed, the case was tried, and a decree entered requiring defendant to pay the balance of the purchase price of such property, with interest thereon at 7 per cent. per annum from the 1st day of January, 1894, within 60 days after the date of such decree, and further decreeing that, in default thereof, he be barred and foreclosed of any right, title, or interest therein, from which decree the defendant appeals.

1. It is claimed that the decree ought to be reversed, and the complaint dismissed, because the plaintiff failed to show such a possession of the property in question at the time the suit was instituted as to entitle it to maintain a suit under section 504 of the Code, to determine an adverse interest in real estate. The evidence upon this point shows that the premises were when the bond was given, and at the time the suit was commenced, vacant, unimproved, uninclosed and unoccupied city lots, and never had been in the actual possession of either the plaintiff or defendant. If therefore, this was a suit under the section referred to, there might be room for argument as to whether the constructive possession of such property which follows the legal title would be sufficient to sustain the suit. But, in our opinion, the statute in question has no application to a case of this character. The remedy sought and the relief granted have always been within the jurisdiction of a court of equity. Although the complaint contains allegations indicating that it was framed under the statute, the relief sought is, in effect, a decree barring and foreclosing the equitable interest of the defendant under the contract in question, and this belongs to one of the well-recognized grounds of equitable jurisdiction. Under an agreement for the sale of land, the vendor has, under the doctrine of equitable conversion, a so-called "equitable lien" upon the property for the unpaid purchase money; and courts of equity have always exercised jurisdiction in cases arising under such contracts to enforce such lien and foreclose the rights of the delinquent vendee: 1 Ping. Mortg. § 308; 3 Pom. Eq. Jur. § 1260. Independent, therefore, of any statute, the court had jurisdiction, whether the plaintiff was in possession or not.

2. Again, it is claimed that the complaint should be

dismissed, because there is neither allegation nor proof that plaintiff or the Hales ever offered to perform their part of the contract. A sufficient answer to this contention is that the case at bar is neither a suit for the specific performance of the contract nor for the rescission or cancellation thereof, but one to enforce the right of the vendor to have the equitable interest of the vendee barred and foreclosed; and, while in such case there is a conflict in the authorities, it is believed to be the better rule that a failure to tender performance before suit is no defense: *Freeson v. Bissell*, 63 N. Y. 168.

3. A failure in this regard can only affect the question of costs which is always in the discretion of the court. If a defendant in such a suit should rely upon the want of such an offer, and there should be no unjustifiable resistance to taking a decree by the plaintiff, doubtless the court would require the plaintiff to pay all the costs of the proceeding. But no such defense is made here. On the contrary, the case has been stubbornly contested throughout on wholly technical grounds, entirely inconsistent with the idea that a tender would have been of any effect, and therefore the costs must abide the result: *Lewis v. Hawkins*, 90 U. S. (23 Wall) 119; *Morris v. Hoyt*, 11 Mich. 9; *Seeley v. Howard*, 13 Wis. 336.

4. And, finally, it is contended that the decree is erroneous, because it does not order the land sold as on foreclosure of a mortgage with right of redemption to the defendant. But, as we understand the law, a decree of strict foreclosure may properly be rendered in a case of this character: 2 Jones, Mortg. § 1541. Mr. Pomeroy, speaking of the rights and equities of a vendor and vendee under a contract for the sale of land, says that, until the terms of the contract are complied with, "the legal title

remains in the vendor as his security ; or, as it is otherwise expressed, he has a lien upon the vendee's equitable estate as security for payment of the purchase money according to the terms of the agreement. Practically, this lien consists in the vendor's right to enforce payment of the price by a suit in equity against the vendee's equitable estate in the land, instead of by means of an ordinary action at law to recover the debt. In England the vendor's equitable remedy consists in a suit in the nature of a strict foreclosure, by which the vendee is decreed to pay the price within a limited time ; and, in default of such payment, the contract is canceled, the vendee's equitable estate is foreclosed, and the vendor's legal estate becomes again absolute. In the United States the same mode of enforcing the lien by a suit in the nature of a strict foreclosure is pursued. Another mode seems to be recognized, at least in some of the states, by which the vendee's equitable estate under the contract is sold in pursuance of a judicial decree. Such a sale would operate as an assignment of the vendee's rights under the contract, and would not be a cancellation of the contract itself": 3 Pom. Eq. Jur. § 1260, note 2. See, also, *Button v. Schroyer*, 5 Wis. 598 ; *Baker v. Beach*, 15 Wis. 108 ; *Landon v. Burke*, 36 Wis. 378 ; *McIndoe v. Morman*, 26 Wis. 588 (7 Am. Rep. 96) ; *Vail v. Drexel*, 9 Ill. App. 439.

It is claimed, however, that this doctrine is abrogated by section 414 of the Code, and that a decree in such suit must order the land sold in the manner provided by law for a sale under execution to satisfy the balance due on the purchase price. But that section has reference to the foreclosure of liens for the security of some debt, while the vendor's so-called "lien" under a contract for the sale of land is not strictly a lien at all, but merely an equitable right "to compel the vendee to make payment of the purchase money within a specified time, or else be

barred of all right under the contract." 3 Pom. Eq. Jur. § 1262. His right in this regard is analogous in many respects to the right of a purchaser at foreclosure sale to compel a subsequent lien creditor, who was not made a party to the suit, to redeem. In such case a court of equity will compel the creditor to exercise his right of redemption within a reasonable time, or, in default thereof, be as effectually foreclosed of his equity of redemption without sale as if he had been made a party to the original decree. *Parker v. Child*, 25 N. J. Eq. 41; *Shaw v. Heisey*, 48 Iowa, 468. It is true, the right of a vendor under an agreement for the sale of land is often designated and generally spoken of in the books as a lien; but an examination of the authorities will show that the term is but another mode of expressing the vendor's interest, under the settled doctrine of conversion wrought by a contract for a sale of the land. Under this doctrine, the vendee is regarded as the beneficial owner, and the vendor the holder of the legal title as security for the performance of the vendee's obligations, and as his trustee, subject to such performance; and the so-called "lien" is simply the vendor's right to enforce his claim for the purchase money against or out of the vendee's equitable estate, by means of a suit in equity. The whole doctrine of conversion and the rights of vendor and vendee thereunder is purely equitable and independent of any statute, and we know of no reason why it should not be enforced in this state according to the common-law rules governing such matters. In the light of this doctrine, a vendor under such a contract has a right, if he chooses, to go into a court of equity upon the default of his vendee, and foreclose the latter's equitable interest in the land; and in such suit the court may either decree a strict foreclosure or a sale of the land, as the equities of the case may suggest. *Vail v. Drexel*, 9 Ill. App. 439. The de-

cree in this case was in the nature of a strict foreclosure, and, in our opinion, was fully warranted by the facts; but it should have required the plaintiff to convey to the defendant the property in question in fee simple, free and clear of all incumbrances, by a good and sufficient deed, with general warranty of title, as stipulated in the bond, in case of the payment of the balance due on the purchase price within the time limited. With this modification, the decree will be affirmed.

AFFIRMED.

Argued 18 May; decided 26 May, 1898.

SEARS v. KINCAID.

[53 Pac. 308]

1. MANDAMUS—CONTENTS OF WRIT.—A writ of mandamus must itself point out the acts required to be done, and the person against whom it is directed cannot be required to look beyond the language of the writ to ascertain such acts.
2. DUTY OF SECRETARY OF STATE—AUSTRALIAN BALLOT LAW.—Under section 45 of the election law of this state, commonly known as the Australian Ballot Law (Laws, 1891, p. 22), the secretary of state is required to certify to the names of candidates, and to the other matters contained in the several certificates which are required by law to be placed on the official ballot, and mandamus will not compel him to do more, as, for example, to certify that a particular candidate was nominated by a certain party.*

*NOTE.—*Nominees of Rival Factions.*—Certified nominees of rival factions of a party will both be admitted to representation on the official ballot: *Shields v. Jacob* (Mich.), 13 L. R. A. 780; *Phelps v. Piper* (Neb.), 83 L. R. A. 58; *Sims v. Daniels* (Kan.), 35 L. R. A. 146; *Stephenson v. Board of Commissioners* (Mich.), 42 L. R. A. 214; *contra, McDonald v. Hinton* (Cal.), 35 L. R. A. 152; *Hutchinson v. Brown* (Cal.), 42 L. R. A. 233.

Nominations by Unusual Conventions.—A nominating convention need not of necessity be composed of delegates; a mass meeting is sufficient, if it be according to party usage: *Manston v. McIntosh* (Minn.), 28 L. R. A. 605. A gathering of a few persons from a single county, without any general notice, and without being chosen by any electors is not a convention that can nominate a ticket: *State ex rel. v. Johnson* (Mont.), 34 L. R. A. 313; nor can a political club call itself a convention and be recognized as such: *State ex rel. v. Tooker* (Mont.), 34 L. R. A. 315.

Rescinding Nomination.—In the absence of fraud or oppression a political convention may rescind its action in making a nomination and make a new nomination, and its final determination as to candidates and other matters within its jurisdiction will be followed by the courts: *Phillips v. Gallagher* (Minn.), 42 L. R. A. 222.

Political Committees.—A duly assembled convention of a political party may

From Marion: HENRY H. HEWITT, Judge.

Mandamus by James K. Sears against Harrison R. Kincaid, as secretary of state, who appeals from an order issuing the writ.

REVERSED.

For appellant there was an oral argument by *Mr. Seneca Smith*.

For respondent there was an oral argument by *Mr. A. W. Prescott*.

MR. JUSTICE BEAN delivered the opinion.

This is a mandamus proceeding brought by James K. Sears, who claims to be the nominee of the People's Party for the office of state treasurer, to compel the defendant, as secretary of state, to receive and file his certificate of nomination and acceptance thereof, and to otherwise recognize him as the regular candidate of that party for said office. The alternative writ, setting forth the facts according to the plaintiff's petition, avers, in

delegate its power to a committee, and candidates nominated by that body are the party nominees: *White v. Sanderson* (Minn.), 42 L. R. A. 231; but nominees of a self-constituted committee without delegated authority will not be permitted on an official ballot: *State ex rel. v. Tooker* (Mont.), 34 L. R. A. 315. Equity cannot control the action of a chairman of a political committee in adding members to fill alleged vacancies, or in expelling others: *Kearns v. Howley* (Pa.), 42 L. R. A. 235. The power of a party convention cannot be controlled by the executive committee who call it: *Hutchinson v. Brown* (Cal.), 42 L. R. A. 232.

Requirement of Per Cent. of Total Vote.—The provision that a party must have cast at least a given per cent. of the total vote at the last preceding election to entitle it to a party designation on the official ballot is generally upheld: *DeWalt v. Burtley* (Pa.), 15 L. R. A. 771 (28 Am. St. Rep. 814); *State ex rel. v. Black* (N. J.), 16 L. R. A. 709; *State ex rel. v. Poston* (Ohio), 42 L. R. A. 237; *State ex rel. v. Anderson* (Wis.), 42 L. R. A. 239.

Limitation to One Place on Ticket.—For a discussion of the right of a candidate to have his name on the ballot under the designation of each party by which he has been nominated, see *Fisher v. Dudley* (Md.), 12 L. R. A. 586; *Todd v. Election Commissioners* (Mich.), 29 L. R. A. 330; *State ex rel. v. Burdick* (Wyo.), 34 L. R. A. 845; *State ex rel. v. Bode* (Ohio), 34 L. R. A. 408 (60 Am. St. Rep. 606); *State ex rel. v. Anderson* (Wis.), 42 L. R. A. 239; *Miller v. Pennoyer*, 23 Or. 364.—REPORTER.

substance, that at a regularly called state convention of the People's Party, held in the City of Portland on March 23, 1898, the plaintiff was nominated as the candidate of such party for the office of state treasurer, and that his certificate of nomination and acceptance thereof, copies of which are set out, were presented to the defendant secretary of state for filing, who refused to file either of such papers, and notified the plaintiff that he would not recognize their validity, and would not certify or file the same in his office, or make or transmit duplicates thereof to the county clerks of the several counties in the state or post them in his office. The writ thereupon commands the defendant to file such certificate of nomination, and plaintiff's acceptance thereof, as of the date when the same was tendered to him for filing, and, within the time required by law, to arrange the name of the petitioner upon the form of the ballot, etc., or show cause, at a time fixed, why he has not done so. At the time required the defendant appeared, and for his return to the writ admits that a certificate of plaintiff's nomination, and of his acceptance thereof, in words and figures as set out in the alternative writ, were presented to him for filing at the time alleged, but denies that he refused to file the same, and affirmatively avers that he had filed both of such papers prior to the service of the alternative writ upon him. He also denies that plaintiff is the regular nominee of the People's Party for the office of state treasurer, or entitled to be recognized as such, and admits that he has and does refuse to so recognize him because he was never nominated by the People's Party.

For a further and separate defense to the alternative writ the defendant alleges, in substance, that the plaintiff was not nominated for the office of state treasurer, or for any office, by the regular People's Party convention, but

by a so-called convention composed in part of bolters from such regular convention. A part of the answer was stricken out, on motion, and a demurrer to the remainder was sustained, on the ground that it constituted no defense to the alternative writ, and, defendant declining to plead further, a peremptory writ of mandamus was issued, commanding him "that, after having received and filed the certificate of nomination of the plaintiff herein as the People's Party nominee for the office of treasurer of the State of Oregon, and the plaintiff's acceptance thereof, as alleged in the defendant's answer herein, you certify the same, within the time prescribed by law, under the seal of the State of Oregon, and file the same in your office, and make and transmit a duplicate thereof by registered letter to the county clerk of each county in the State of Oregon within the time required by law, and that you post a duplicate thereof immediately in a conspicuous place in your office, and keep the same so posted until after the election to be held on the sixth day of June, 1898, and, in general, do all things required of you by the statutes of the State of Oregon, and necessary to place the plaintiff before the voters of the State of Oregon at the said election as a candidate for the office of state treasurer of the State of Oregon." The defendant appeals, claiming that there is no law requiring or authorizing him to do any of the things which he is commanded to perform by the peremptory writ, and, if this position is sound, the judgment must be reversed.

1. A mandamus is an extraordinary writ, directed to an inferior court, corporation, board, officer, or person, to compel the performance of some particular thing therein specified, and which the law specially enjoins upon the defendant as a duty resulting from his office, trust or station

(Code, § 593, and Bouv. Law Dict.) ; and therefore great care is required in stating in the writ the particular thing commanded to be done, in order that the party to whom it is directed may know the precise duty to be performed, and because the writ must be enforced in the terms in which it is issued or not at all. The duty of the defendant, the performance of which it is the office of the writ to compel, cannot be left to outside ascertainment, nor can he be required to look de hors the language of the writ, but it is elementary law that he may look to the mandatory clause alone to ascertain what acts he is required to perform : High, Extr. Rem. §§ 531, 561 ; 2 Spell. Extr. Rel. § 1698 ; Merrill, Mand. § 260 ; *Harts-horn v. Assessors*, 60 Me. 276 ; *State ex rel. v. Mobile Railway Co.*, 59 Ala. 321 ; *People ex rel. v. Brooks*, 57 Ill. 142.

2. Now, the mandatory clause in the writ issued in this case is perhaps susceptible of two interpretations. It either requires the defendant to certify to the nomination of plaintiff, and to transmit to the several county clerks, and post and keep posted in his office, a duplicate of such certificate, or it commands him to certify to the certificate of such nomination and acceptance thereof, and so transmit and otherwise dispose of the same. But, in either event, it requires the performance of acts not enjoined upon the defendant by law. Section 45 of what is known as the " Australian Ballot Law " (Sess. Laws 1891, p. 33) requires the secretary of state, not less than 28 nor more than 30 days before the day fixed for the election, to arrange, in the manner provided in the act for the arrangement of names and other information upon the ballots, all the names and other information concerning all the candidates contained in the certificates of nomination which have been filed with him and accepted by the nominees, and to forthwith certify to and file the same, and

make and transmit to the several county clerks and post in his office a duplicate thereof. But there is no law requiring him to certify to the several certificates of nomination, or of the nominees' acceptance thereof, or to transmit to the county clerks or post in his office a duplicate of such papers, nor is he authorized or required to certify to the nomination of any of the candidates, or to transmit to the several county clerks or post in his office any certificate upon that subject whatever. His duty is confined to the arrangement of the names and other information concerning the candidates contained in the certificates of nomination on file in his office, in the manner provided by law for the arrangement of the names and other information upon the ballot, and to certify to the same and transmit to the various county clerks, and post in his office a duplicate thereof. In short, he is required to certify to the names of the candidates, and to the other matters contained in the several certificates of nomination, and which are required by law to be placed on the official ballot, but not that the persons so named are, in fact, the nominees of any party; and, so far as the question has received judicial consideration, the holdings are quite uniform that, under statutes like ours, he has no power or authority in so doing to pass upon the regularity or validity of such nominations, or to inquire into the regularity of the conventions by which they purport to have been made: *Shields v. Jacob*, 88 Mich. 164 (13 L. R. A. 760, 50 N. W. 105); *People v. District Court*, 18 Colo. 26 (31 Pac. 339); *People v. McGaffey*, 23 Colo. 156 (46 Pac. 930); *State v. Allen*, 43 Neb. 651 (62 N. W. 35); *Pelphs v. Piper*, 48 Neb. 724 (33 L. R. A. 53, 67 N. W. 755); *State v. Piper*, 50 Neb. 25 (69 N. W. 378); *Sims v. Daniels*, 57 Kan. 552 (35 L. R. A. 146, 46 Pac. 952); *Robbins v. Harrity*, 2 Pa. Dist. R. 163. It follows that whether we accept the defendant's construction of the

language of the peremptory writ, or adopt that of the plaintiff, it in either event requires the performance by the defendant of acts not enjoined upon him by law, and its issuance was therefore error. Under this view, the questions raised by plaintiff's motion to dismiss become immaterial. The judgment of the court below will be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

Argued April 11; decided 20 June, 1898.

HAYDEN v. BROWN.

[52 Pac. 490]

1. **SUFFICIENCY OF DESCRIPTION IN DEED—COURSES.**—A description of a tract as commencing at a given spot, "running thence one point east of south * * * thence one point west of north" * * * is sufficiently accurate to be identified, since it appears that a "point" is a division of a mariner's compass equal to $11^{\circ} 15'$.
2. **CONSTRUCTION OF DEED—DESCRIPTION.**—When, by omitting one part of a false or impossible description in a deed, a perfect description remains, the false part should be rejected, and the instrument upheld. *Willamette Falls Canal Co. v. Gordon*, 8 Or. at p. 179, and *House v. Jackson*, 24 Or. 89, applied.

From Jackson: HIERO K. HANNA, Judge.

This is a suit to enjoin an alleged trespass. The plaintiffs allege: That they are the owners of and in possession, and entitled to the possession of a mining claim in Jackson county, described as follows: "Commencing at the discovery shaft on the said claim, known as the 'Mountain Lily Ledge,' situated in sections two and thirty-five, township thirty-six south, of range three west of the Willamette meridian, on Paddy Hill, in the Centennial mining district, running thence one point east of south five hundred feet, thence from said shaft one point west of north one thousand feet; being six hundred feet in width,—three hundred feet on each side of

the above-described line." That said defendants have heretofore gone upon said mining claim, and extracted therefrom gold and gold-bearing rock and dirt of great value,—the actual value thereof being unknown to plaintiffs; and that they threaten to so trespass upon said mining claim, and extract gold and gold-bearing rock and dirt therefrom. That plaintiffs verily believe they will continue to do so, unless restrained by the court, to plaintiffs' great and irreparable damage and injury. That plaintiffs have no plain, speedy, or adequate remedy at law, etc. The answer specifically denies each allegation of the complaint, except plaintiff's ownership, possession, and right of possession, and the cause, being at issue, was referred, and the testimony taken, from which the court found "that the allegations of the complaint charging defendants with trespassing upon the mining claim described therein have not been sustained, and that there is no evidence showing such trespass," and dismissed the suit, from which decree plaintiffs appeal.

REVERSED.

For appellants there was a brief over the name of *Hammond & Vawter*, with an oral argument by *Mr. A. S. Hammond*.

For respondents there was a brief and an oral argument by *Mr. Samuel Stanley Pentz*.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1: Counsel for plaintiffs contend that the decree complained of is based upon the false assumption that the description of the mining claim is too indefinite and uncertain for identification, and that, if it does describe any

claim, the boundaries thereof would not include the land upon which the defendants are working; while counsel for the defendants insist that the description locates the claim in two sections four miles apart, thus showing that it is more than 1,500 feet in length, and therefore not a legal claim. The evidence tends to show that the Mountain Lily Ledge was located prior to the Ida Bell mining claim, which is owned by the defendants, and either adjoins or intersects plaintiffs' claim. It also appears that the Mountain Lily Ledge is distinctly marked on the ground by stakes, stones, or marked trees placed or growing at each corner of the claim; and at the center of each of the end lines, and between these monuments the exterior lines of the claim are blazed on the trees standing thereon, and that the discovery shaft is situated 6 chains and 43 links west and 5 chains and 10 links south of the corner to sections 1, 2, 35, and 36 on the line between townships 36 and 37 south, of range 3 west of the Willamette meridian. It is the discovery of a vein or lode within the limits of a mining claim that renders the location thereof effectual (Rev. St. U. S. § 2330; *Gleeson v. Martin White Mining Co.*, 13 Nev. 442); but, no issue having been raised upon this question, plaintiffs were under no obligation to prove the fact, notwithstanding which the evidence tends to show that a mineral lode was found in the discovery shaft. The pleadings also admit that plaintiffs are the owners of, and in possession, and, such being the case, the important questions presented by this appeal are whether the mining claim in question is so definitely and certainly described as to enable a competent surveyor, with the pleading before him, to locate the premises by the description therein, and the aid of extrinsic evidence; and, if so, have the defendants trespassed thereon? The testimony of Peter Applegate, a mineral surveyor of much experience, shows

that a mariner's compass is divided into 32 equal parts called "points," each of which is 11 degrees and 15 minutes, and that a "point," when used to indicate a course, though not ordinarily adopted in land surveys, is as definite and certain as though the number of degrees and minutes were given; that running the center line one point east of south and one point west of north from the discovery shaft means a line running south, 11 degrees, 15 minutes east, and north, 11 degrees and 15 minutes west from the shaft. We think there can be no reasonable ground for controversy on this question, and that the course, as given in the complaint, when read in the light of this testimony, renders the identification of the center line of the mining claim certain.

2. So, too, the description of the claim as being situated in sections 2 and 35 in township 36 south, of range 3 west, etc., shows that the claim is more than 4 miles in length; and, as but 1,500 feet in length can be embraced in a mineral location, it is evident that one or both of these sections must be rejected from the description. When, by omitting one part of the description in a written instrument which is false or impossible, a perfect description remains, the false part should be rejected, and the instrument upheld as effectual to carry out the intention of the parties to it: *Anderson v. Baughman*, 7 Mich. 69 (74 Am. Dec. 699). "A grant," says Mr. Justice WRIGHT in *Seaman v. Hogeboom*, 21 Barb. 398, "is not to be frustrated altogether, or the intention of the parties rendered less certain, by resorting in the construction of it to a mistaken and uncertain circumstance, if there be that in the description which can be sufficiently ascertained to render the intention entirely manifest, and preserve the grant." Invoking the rules here announced, we think the description in the complaint, as explained

by the evidence, sufficient to enable a competent surveyor to locate the boundary of the said Mountain Lily ledge claim; and hence the complaint is sufficient in this particular: *Lock Co. v. Gordon*, 6 Or. 175; *House v. Jackson*, 24 Or. 89 (32 Pac. 1027).

The evidence also tends to show that the defendants have been mining within the boundary marked by said monuments, and about 80 feet west of the east line of plaintiffs' said claim, and hence have trespassed upon their premises. Some evidence of an arbitration between the former proprietors of the Mountain Lily Ledge and the Ida Bell claim was introduced at the trial, tending to show that a boundary line had been agreed upon by those to whom the matter was submitted, but there was no allegation of such arbitration, and hence the evidence thereof was immaterial (*Morse*, Arb. 584); but, if such evidence were deemed competent, an inspection of the award, which is made a part of the transcript, fails to disclose where the boundaries were located by the arbitrators. It follows that the decree of the court below must be reversed, and one entered here perpetually enjoining defendants, their agents, etc., from trespassing upon or removing the gold, gold-bearing rock or dirt from said premises.

REVERSED.

Argued 13 April; decided 20 June, 1898.

TOWNS v. KLAMATH COUNTY.

[53 Pac. 604]

1. ROAD OF PUBLIC EASEMENT—SUFFICIENCY OF DESCRIPTION.—A petition for the location of a private road, under sections 4075 to 4079, inclusive, of Hill's Ann. Laws, need not contain any statements except those provided in said sections—the termini need not be described: *Woodruff v. Douglas County*, 17 Or. 314 distinguished.
2. *IDEM*.—The location of a road of public easement laid out under Hill's Ann. Laws, §§ 4075–4079, is described with sufficient accuracy to enable persons inter-

33 OR.—15.

33	225
33	262
33	225
37	373
37	375
38	417
33	225
46	549
33	225
48	483
48	618

ested to locate it with reasonable certainty, where the petition states its beginning to be at a point near the barn of the petitioner and thence along the present traveled road to an intersection with another road named.

3. **WAIVER OF SERVICE OF PROCESS BY GENERAL APPEARANCE.***—One who appeared in the county court and contested upon the merits a proceeding to locate a public road cannot thereafter complain that there was no sufficient service of a copy of the order appointing viewers.
4. **PRESUMPTION OF REGULARITY—ROAD PROCEEDINGS.**—After a county court has acquired jurisdiction in a proceeding for locating a public road the same presumptions prevail regarding its proceedings as would prevail concerning courts of general jurisdiction. Therefore it will be presumed on appeal that persons appointed as viewers of a proposed road were “disinterested freeholders” as required by statute, when the contrary is not shown: *North Pacific Terminal Co. v. City of Portland*, 14 Or. 24, distinguished.
5. **CONSTITUTIONALITY OF ROAD CONDEMNATION PROCEEDINGS.**—In considering statutes providing for taking private property for roads, the test of constitutionality is the use to which the road will be subject—if it is open for the public to use, the statute is valid, but it is otherwise if it is for the exclusive use of the petitioner.
6. **CONSTITUTIONAL LAW—NOTICE.**—The constitutional rights of a non-consenting landowner are not infringed because he has no prior notice of an intended application for the laying out of a public road, but it is sufficient if he has subsequent notice and is afforded an opportunity at some stage of the proceedings to be heard on the question of compensation for his land sought to be appropriated. *Branson v. Gee*, 25 Or. 482, cited.

From Klamath: W. C. HALE, Judge.

Writ by Mary E. Towns to review certain proceedings. The circuit court having dismissed the writ, petitioner appealed again.

AFFIRMED.

For appellants there was a brief over the names of *J. W. Hamaker* and *Hiram F. Murdoch*, with an oral argument by *Mr. Hamaker*.

For respondent there was a brief over the names of *J. A. Jeffrey* and *G. W. White*.

MR. JUSTICE BEAN delivered the opinion.

* NOTE.—Other cases applying this rule are *Belknap v. Charlton*, 25 Or. 41, and *Mayer v. Mayer*, 27 Or. 133.—REPORTER.

This is a writ of review to test the validity of the order and judgment of the County Court of Klamath County in the matter of the location of a road of public easement over and across the land of Mary E. Towns and comes here on an appeal from an order of the court below dismissing the writ, and affirming the proceedings of the county court. The proceedings in question were taken, and the road located, under an act of the legislature entitled "An act to create roads of public easement," approved October 20, 1876, and which constituted sections 4075 to 4079, inclusive, of Hill's Annotated Laws. By the first section of the act it is provided that "whenever it shall appear to the county court of any county in this state, by the sworn petition of any person, that the residence of such person is not reached by any convenient public road heretofore provided for by law, and that it is necessary that the public and such person shall have ingress to and egress from the residence of such person, the county court shall thereupon appoint three disinterested freeholders of the county as viewers, and cause an order to be issued directing them to meet at a time therein specified, and not less than ten days from the making of such order, and view out and locate a county road, thirty feet in width, from the residence of such person to some other public road or navigable stream, according to the application, and to assess damages to be sustained thereby, a copy of which order shall be served upon the persons through whose land said road shall pass, within four days after the making of such order." Section 2 requires the viewers to meet upon the day designated in the order, and proceed "to locate and mark out a public road from some certain point on the premises of the applicant to some certain point upon another public road or navigable stream, so as to do the least damage to the land through which such road is located, and shall assess the damages sus-

tained by the person or persons owning such lands." Section 3 requires the viewers to make their report at the next regular term of the county court, and provides that "if the county court is satisfied that such report is just, and after payment by the petitioner of the costs of locating such road and the damages assessed by the viewers, the court shall order such report to be confirmed, and declare such road to be a public road, and the same shall be recorded as such; and any person aggrieved by the assessment may appeal, within twenty days after the confirmation of such report, to the circuit court." Section 4 provides for the punishment of persons obstructing a road so located, or refusing to allow the same to be opened. And section 5 declares that "such public roads shall be called roads of public easement, and shall be opened and kept passable by the person applying for the same." Several objections are made to the proceedings of the county court in the matter of the location of the road in question, which we shall consider in their proper order.

1. It is first claimed that the court was without jurisdiction, because the petition for the location of the road does not describe the termini thereof with certainty. As described in the petition, the route of the proposed road is as follows: "Commencing about one hundred feet north of the barn near the residence of the petitioner; thence, running in a northerly direction, following the present traveled road around the point of the hill; thence, in a southeasterly and easterly direction, along the present traveled road as near as practicable, to a connection with the Fort Klamath and Linkville public road, at a point about ten miles from Klamath Falls, and near a large pine tree marked with a cross on the north side." The contention for the plaintiff is that, al-

though the petition describes by legal subdivisions the land owned by the petitioner, it is not possible to determine from the description of the route of the proposed road, with any degree of certainty, either the beginning or ending points thereof, and hence the petition is insufficient to give the court jurisdiction of the subject matter. Assuming counsel's construction of the language of the petition to be correct, the vice in his argument lies in attempting to apply to petitions for the location of roads of public easement under the act of 1876 the same technical accuracy in regard to the description of the route of the proposed road as is required in petitions for the location of a county road under the general laws of the state, the statutory requirements in the two cases being essentially different. In the matter of the location of a county road, the statute provides that the petition must "specify the place of beginning, the intermediate points, if any, and the place of termination of said road" (Hill's Ann. Laws, § 4062); and unless it does so the court is without jurisdiction to lay out or establish the desired road. *Woodruff v. Douglas Co.*, 17 Or. 314 (21 Pac. 49.) But there is no such provision as to the contents of a petition for a road of public easement. All the statute affirmatively requires in such case is that the petition show (1) that the residence of the petitioner is not reached by any convenient public road; and (2) that it is necessary that the public and the petitioner shall have ingress to and egress from such residence; and, when these facts are made so to appear, it is the duty of the county court to appoint viewers "to locate and mark out a public road from some certain point on the premises of the applicant to some certain point upon another public road," etc. The statute does not require the petition to contain even a description of the route of the proposed road; and it may well be doubted, in view

of its language and obvious purpose, and the discretion vested in the viewers as to the location of the road, whether an entire omission in this respect would be fatal to the jurisdiction of the court.

2. But, however that may be, the petition before us contains a sufficient description of the route of the proposed road to enable persons interested to locate it with reasonable certainty. The petition states that the proposed road is to begin at a point near the barn of the petitioner, and thence follow the present traveled road to its intersection with the Ft. Klamath & Linkville Road; and this is sufficiently definite to enable the landowner and the county court to determine with sufficient accuracy the location of the proposed road.

3. The next point made is that no sufficient service of a copy of the order appointing the viewers was made upon the plaintiff. But the record shows affirmatively that she appeared in the county court, and contested the proceedings upon the merits; and this was a waiver of any irregularity in the service of notice, and is a conclusive answer to the point made: *Elliott, Roads & S. 243*; *Kimball v. Supervisors*, 46 Cal. 19.

4. It is next claimed that the proceedings are void because it does not affirmatively appear from the records of the county court that the viewers appointed by it were disinterested freeholders of the county. The recital in the record is that they are "residents and freeholders of Klamath County"; but there is no finding that they were disinterested, and this is claimed to be fatal to the entire proceedings. The statute provides that, when certain facts are made to appear to the county court by a sworn petition of any person, it shall appoint "three disinter-

ested freeholders of the county as viewers," and in our opinion the persons so appointed must be taken to possess such qualifications until the contrary appears. It is true, the county court, in laying out a road of public easement, is exercising a limited and special power, and all the facts necessary to confer jurisdiction must affirmatively appear upon the record. But, as said by the supreme court of Missouri in a similar case, "if we require that every minute particular which the statutes point out as requisite in such proceedings shall appear on the face of the record, so that this court may, on certiorari, be enabled to see an exact conformity to every requisition of the law in all the steps of the proceeding, however formal, not many proceedings of this character would be likely to stand": *Hannibal Railroad Co. v. Morton*, 27 Mo. 317. The appointment of viewers is in no sense jurisdictional. Indeed, such appointment is not to be made until after the court has acquired jurisdiction of the subject matter by the filing of a petition containing the necessary allegations. After such a petition has been filed, and jurisdiction of the subject matter thus acquired, the same intendments and presumptions must thereafter attach to the proceedings of the county court as would attach to courts of general jurisdiction under similar circumstances. In making the appointment, the court acts judicially; and it is a reasonable intendment that it has performed its duty, until the contrary appears. In *re Road from Appellant's Tavern to Susquehanna*, 17 Serg. & R. 387; *Chicago Railroad Co. v. Chamberlain*, 84 Ill. 333; *Lyon v. Green Bay Railway Co.*, 42 Wis. 538. The case of *Northern Pac. Term. Co. v. City of Portland*, 14 Or. 24 (13 Pac. 705), is not in point here, because it involved the validity of the proceedings of the common council of the city of Portland in appropriating private property for the purpose of opening and establishing a

street; and as said by the writer of the opinion, in a subsequent case (*Bewley v. Graves*, 17 Or. 274, 20 Pac. 322), the common council "cannot be said to be a court, in any sense of that term; but it has certain specified and limited powers conferred upon it, to lay out and widen streets, etc., which it may exercise by complying with the charter."

5. Again, it is contended that the law under which the proceedings in question were had is unconstitutional and void because (a) it provides for the taking of private property for private use; and (b) it makes no provision for such notice to the non-consenting landowner as will enable him to appear and contest the allegations of the petition, or take part in the selection of the viewers by whom his damages are to be assessed. Laws exist in most of the states for the laying out of what are called "private roads," or "roads of public easement"; and these statutes have in some cases been held valid, and in others invalid. The principle to be deduced from the adjudged cases, bearing upon the question, seems to be that if, by a fair construction and operation of the statutes, the road, when laid out, is in fact a public road, for the use of all who may desire to use it, the law is not liable to the charge of unconstitutionality, and is valid, though the road may be laid out on the application of, paid for and kept in repair by the petitioner, and primarily designed for his benefit; but if such road is to become a mere private way, and not open to the public, the law sanctioning it is void. *Lewis*, Em. Dom. § 167; 6 Am. Law Rev. 197; *Denham v. Commissioners*, 108 Mass. 202; *Latah Co. v. Peterson*, 2 Idaho, 1118 (29 Pac. 1089); *Shaver v. Starrett*, 4 Ohio St. 494. Within this principle, the act in question is valid. The road provided for is an open public way, 30 feet in width, which may

be traveled by any person who desires to use it. The fact that it may accommodate but a limited portion of the public, or even but a single family, is no objection to the validity of the law providing for its location. The test is whether it is an open public way, or one for the exclusive use and benefit of the petitioner.

6. Nor is there any merit in the objection that no provision is made for notice to the non-consenting landowner of the intended application. The preliminary question as to the location of a public road, and the appropriation of private property therefor, is political, rather than judicial, and rests in the exclusive control and discretion of the legislature, and may be determined without notice to the owner of the property to be affected. It is sufficient for the protection of his constitutional rights if he has notice, and is given an opportunity at some stage of the proceedings to be heard upon the question of compensation for his land so appropriated. And the statute in question makes such a provision: *Lewis on Eminent Domain*, § 366; *Zimmerman v. Canfield*, 42 Ohio St. 463; *Branson v. Gee*, 25 Or. 462 (36 Pac. 527); *Lent v. Tillson*, 72 Cal. 404 (14 Pac. 71). It is true there is some conflict in the authorities as to whether the owner of land sought to be appropriated for a public use is entitled, in the first instance, to such notice of the proceedings as will enable him to take part in the selection of the tribunal to ascertain his compensation. It is quite agreed that he is entitled to a fair and impartial tribunal, and of necessity is entitled to an opportunity to ascertain whether it is impartial; but the better rule seems to be that "it is not essential that provision should be made for the exercise of this right, in the first instance, in cases where the decision of the tribunal is not conclusive. If there is a right of appeal to a court of general jurisdiction, then

there is an opportunity for securing an impartial hearing under the general rules of law, and no substantial injustice is done; but, if there is no such right, then it is a violation of sound principle to compel a party to be bound, without an opportunity to discover whether the tribunal is or is not an impartial one. It is not easy to perceive any just reason upon which the doctrine that a conclusive decision may be rendered, and no opportunity allowed the parties to ascertain whether the triers are disinterested and unprejudiced, can be sustained. If, however, this opportunity is given before a final hearing is had, no principle is violated, and the rule which prevails in analogous cases is given force": Elliott on Roads and Streets, 241; *State ex rel. v. Johnson*, 105 Ind. 463 (5 N. E. 553); *State ex rel. v. Stewart*, 74 Wis. 620 (43 N. W. 947).

We are of the opinion that the law in question is valid, that the proceedings of the county court are regular, and that the judgment of the circuit court must be affirmed.

AFFIRMED.

Decided 30 April, 1898.

FIRST NAT. BANK v. HOME INS. CO.

[52 Pac. 1055]

TRIAL—POWER OF COURT TO CONTROL TESTIMONY.—Under the general power to control the conduct of a case a judge may *sua sponte* withdraw improper testimony from consideration by the jury, or may limit its application, particularly where counsel were notified on offering the testimony that such a ruling might be made at the conclusion of the trial.

From Multnomah: ALFRED F. SEARS, Judge.

Action by the First National Bank of Portland against the Home Insurance Company, in which plaintiff recovered.

AFFIRMED.

For appellant there was a brief over the name of *Cox, Cotton, Teal & Minor*, with an oral argument by *Mr. William W. Cotton*.

For respondent there was a brief over the names of *Henry E. McGinn*, and *Dolph, Mallory & Simon*, with an oral argument by *Mr. McGinn*.

MR. JUSTICE WOLVERTON delivered the opinion.

The action in this case is to recover upon three policies of insurance against loss or damage by fire, which were concurrent with the policies sued on in *First National Bank of Portland v. Commercial Union Assurance Co.* and *Same v. Phoenix Assurance Co.* (just decided). This case was tried before the others, but the issues presented by the pleadings are identical. Two questions are raised here, one of which is settled by the opinion in those cases. The other we will now dispose of.

One Henry Jacobs was called by the defendant as a witness in its behalf, and was asked whether he had not made a certain supposed statement in the presence of certain parties, at a given time and place, which he denied. Thereafter it called Louis Prager, and put to him the following question: "State if, on the twenty-first day of October last, in your store, in the city of Portland, you and Jacobs being together, you had a conversation with Jacobs in regard to the Wolf fire, in which Jacobs said he had applied a compound of alcohol and arsenic and some other material to the goods in the store of H. Wolf & Brother; that there was a scheme to set it off that night about twelve or half past twelve o'clock; that it was set by a candle which had been so arranged or fixed as that it would burn down and come in contact with the inflammable material about that time of night;

that Marcus Wolf fixed the candle, and he must have been nervous, and tipped it over, or something to that effect; and that the fire went off sooner than was intended; and that Jacobs was procured to do this job by H. Wolf and Marcus Wolf—or words to that effect.” Counsel for plaintiff interposed an objection, which, on being sustained by the court, was immediately withdrawn, and witness answered “Yes.” In the course of the cross-examination the following colloquy took place between the court and the attorneys for plaintiff: “The Court: It has occurred to me that it would not be improper for me to exclude all this testimony. It is entirely immaterial, and I do not see but that I shall be compelled to instruct the jury that it will be considered for no purpose whatever, except as impeaching the witness Jacobs. I may decide to strike this matter out of the case entirely. Judge McGinn: I agree with your honor that it is entirely immaterial, but I do not want one thing in the world kept from the jury. I want them to know that man (pointing to the witness) and his heart when they pass upon the issues in this case. It is a very material matter. I want this man’s feelings to come before this jury when they pass judgment upon Mr. Wolf and his children. I want to show his relations with Jacobs. I want to show to the jury the feelings of this man towards Mr. Wolf. I want everything that he can say brought before this jury, in order that his heart—his wolfish spirit—may come before this jury when they give in their judgment. There sits the man who caused that stock to be burned, and I will prove it before this case ends. The Court: You may complete your examination.” Other witnesses were produced, who testified to the same purport. When the case was submitted to the jury, the court withdrew the evidence as indicated, except as it might operate in the impeachment of the witness Jacobs.

It is urged that since the court had permitted the testimony to remain in the case with a full appreciation of its character, and had allowed counsel for plaintiff to make use of it for the purpose of building up a theory before the jury to the effect that Prager had burned the store, instead of the Wolfs, as alleged by the defendant, it was error for the court *sua sponte* to withdraw the testimony from the consideration of the jury at the last moment.

The testimony which was sought to be, and which was, adduced through the witness, as referred to, was admittedly subject to the objections taken to its introduction; and, if authority was wanted, the case of *State v. Steeves*, 29 Or. 103 (43 Pac. 947), is in point. But the objection was withdrawn, and thenceforth not insisted upon by counsel for plaintiff. However, upon cross-examination of the witness, the court of its own accord took occasion to notify counsel, as it was perfectly proper for it to do, that it would be compelled to instruct the jury that the evidence should not be considered for any purpose except as impeaching the witness Jacobs, and thereupon followed the comment of Judge McGinn. It does not appear whether counsel made any use of this testimony in presenting the case to the jury on final argument. When the court came to instruct, the objectionable testimony was withdrawn without any motion or request of plaintiff. The authorities seem to be uniform that a party who has permitted incompetent or irrelevant testimony to go to the jury without seasonable objection will not be entitled as of right to have it withdrawn by instructions when the case is ripe for the jury. There are two reasons which give support to the rule: One is that a party will not be permitted to lie by when a witness is called against him, and speculate upon the chances, and, when he finds the testimony to be unsatisfactory or has received and used it himself, to ask for its

withdrawal. He thus makes a law unto himself, and must abide by it. *Quin v. Loyd*, 41 N. Y. 349; *Rees v. Livingston*, 41 Pa. St. 113; *Farmers' Nat. Bank v. Greene*, 20 C. C. A. 500 (74 Fed. 439); *McInroy v. Dyer*, 47 Pa. St. 118; *Coombs Commission Co. v. Block*, 130 Mo. 668-683 (32 S. W. 1139); *Rundell v. Butler*, 10 Wend. 119. The other, by not insisting upon the rejection of the objectionable testimony, the opposing party might have been misled into a reliance upon it, whereas he might otherwise have produced other and better evidence in support of his case. *Becker v. Becker*, 45 Iowa, 239; *Porter v. Gile*, 44 Vt. 520. But, notwithstanding this well-settled rule, the court has the general direction and control of the trial of a cause, and, by virtue thereof, may *sua sponte* prevent the introduction of improper evidence, or, if introduced without objection, may seasonably withdraw it, to prevent confusion in the minds of the jury by the consideration of irrelevant matter; and the only question here is whether the court has, in the exercise of its powers in the general direction of the trial, exercised them to the legal prejudice of the appellant. There was timely notice that the court would withdraw the objectionable testimony except for the purpose of impeachment. After this, other testimony was introduced of the same nature, part of which was objected to at first, then objection withdrawn, and part without objection; so that both parties had notice of the court's intention to unburden the case of this objectionable matter, which notice was kept good when the case was submitted to the jury. Neither of the reasons for the rule above alluded to can apply here, and it is not apparent that the jury was misled by the voluntary action of the court, to the prejudice of appellant. The judgment of the court below will therefore be affirmed.

AFFIRMED.

Argued 19 April; decided 20 June, 1898.

HERMANN v. HUTCHESON.

[52 Pac. 489]

33	239
34	206
33	239
39	71

1. SUFFICIENCY OF MOTION TO DISMISS APPEAL.—A party asking the dismissal of an appeal by reason of a technical defect in the proof of service of the notice must specify definitely and with certainty the point of the irregularity complained of: *Bityeu v. Smith*, 18 Or. 335, applied.
2. CERTIFICATE OF SERVICE OF MOTION.—A constable's return of the service of a notice of appeal is insufficient where it specifies that the service was made within a certain county and state, but fails to show that it was made within the constable's own precinct: *Sloper v. Carey*, 9 Or. 511, approved.

From Coos : J. C. FULLERTON, Judge.

Action by Hermann & Brown against D. J. Hutcheson. From a judgment for plaintiffs, defendant attempted to appeal to the circuit court ; but his appeal was dismissed, and he appeals from the judgment of dismissal.

REVERSED.

For appellant there was a brief over the name of *T. S. Minot*, with an oral argument by *Mr. D. L. Watson, Jr.*

For respondents there was a brief over the name of *L. L. Burtenshaw*, with an oral argument by *Messrs. S. H. Hazard and John Bayne*.

MR. JUSTICE WOLVERTON delivered the opinion.

This action was commenced in the justice's court for district No. 5, in Coos County, and judgment having been entered for plaintiffs, the defendant attempted to appeal to the circuit court. The notice of appeal was served by M. R. Lee, constable of such precinct, who certified that he served the same " within the County of Coos and State of Oregon." The plaintiffs moved in the circuit court to dismiss the appeal for want of proof of service of notice thereof. The motion was allowed, and

a judgment of dismissal entered, from which the defendant appeals to this court.

1. The defendant insists that the judgment of the circuit court should be reversed, because the motion to dismiss the appeal from the justice's court does not point out or specify with sufficient definiteness the defect of service of proof thereof upon which the plaintiffs relied for the dismissal, and for that reason it should have been disregarded. He also contends that the proof of service is itself quite sufficient. It must be conceded that the objection to the constable's return is technical in its nature; and this, under the law applicable to such cases, subjects the party who would turn it to his advantage to the observance of technical rules. In passing upon a motion of like character, Mr. Chief Justice THAYER says: "Counsel are required to specify definitely and with certainty the point of irregularity complained of." *Bilyeu v. Smith*, 18 Or. 335, (22 Pac. 1073).

2. To constitute a good service of a notice of this kind, the officer making it is bound to the observance of several conditions the due performance of all of which he is required to signify by his return. Now, if he has omitted any one of these, it would constitute an irregularity in the service, to say the least, and would possibly render it void *in toto*. The rule alluded to requires that the party objecting to the service or return shall put his finger upon the condition the nonobservance of which he relies upon to show the service insufficient or nugatory. The objection in the case at bar "that there is no proof of service, * * * as required by law," was as general as it well could be. Such a motion gives no definite notice to the opposing party of the specific defect relied upon, and no opportunity to meet the objection until the

fault is pointed out at the argument. It often happens that the defect may be cured by amendment, which the courts are always liberal in allowing in furtherance of justice; and it needs but a suggestion at the proper time, and the objection would be speedily obviated. This court being powerless to permit such amendment, the necessity for calling attention opportunely to the specific defect by the motion to dismiss is quite apparent. The specific objection to the present return, when disclosed, was found to be that it did not show that service was made in the constable's own precinct; but the motion having failed to suggest it necessitated a technical inspection of the whole return for the discovery of the alleged defect. It was but a small matter, and the plaintiffs should have pointed it out if it was their purpose to avail themselves of the objection. *Brown v. Goodyear*, 29 Neb. 376 (45 N. W. 618); *Freeman v. Burks*, 16 Neb. 328 (20 N. W. 207). The return as it stands is insufficient, under *Sloper v. Carey*, 9 Or. 511. But, the motion to dismiss the appeal from the justice's court being also insufficient, the judgment of the court below will be reversed, and the cause remanded for such further proceedings as may seem proper.

REVERSED.

Decided at PENDLETON, 13 August, 1898.

LIEBE v. BATTMANN.

[54 Pac. 179]

38	241
42	165
38	241
443	410
143	414

GIFT—WHAT CONSTITUTES DELIVERY.—In order to constitute a delivery of a gift there must be a complete parting with the control over the alleged subject matter with a present design that the title shall at once pass completely to the donee.

IDEM.—No such delivery as is essential to a valid gift takes place where a note is indorsed by the holder and placed in an envelope addressed to a designated person, and the envelope placed on a table in the room of the writer who shoots himself and dies sometime after without any further direction as to the note.

38 OR.—16.

From Sherman : W. L. BRADSHAW, Judge.

Bill of mortgage foreclosure by George A. Liebe, as executor of R. G. Closter, deceased, against Chas. W. Battmann and Chas. A. Schutz who, it was alleged, claimed some interest in the note and mortgage. Battmann defaulted, and after a trial with Schutz there was a decree dismissing the suit, from which plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *Condon & Condon*, and *W. H. Wilson*.

For respondent there was a brief over the names of *J. L. Story* and *Alfred S. Bennett*.

MR. JUSTICE WOLVERTON delivered the opinion of the court.

This is a suit to foreclose a mortgage made to secure the payment of a promissory note calling for \$1,175, executed and delivered by the defendant Battmann to one R. G. Closter. The plaintiff claims title to the note and mortgage as the executor of the last will and testament of Closter, while the defendant Schutz asserts ownership based upon an alleged gift to him by Closter. This presents the only question in the case, and, if plaintiff is the owner, he is entitled to have the mortgage foreclosed, but, if not, the suit should be dismissed.

The facts upon which it is sought to establish the gift are, in substance, as follows: Closter and Schutz had been intimate friends for many years, and on Friday, August 21, 1896, were living in a house which they had rented together, and where they ate at the same table. There was a large room in the building, opening out of

which was a bedroom on the east and another on the south. Closter occupied the east room, and Schutz the one on the south. Schutz, who had been out the night before, came home about 5 o'clock in the morning, and, after a brief but friendly conversation with Closter, retired to his room, and about 6 o'clock heard the report of a pistol shot coming from Closter's room, to which he hastened, and found that Closter had shot himself in the left side of the head, near the temple. A physician being called, Closter requested him "to make short work of it, that he wanted to die"; but shortly he passed into a comatose state, from which he never rallied, and died four days thereafter. On a small table at the head of his bed was found a couple of large envelopes, both sealed and addressed, one to Charles A. Schutz, Esq., and the other to Mrs. Bertha Vierea. Schutz handed these envelopes to the plaintiff, who kept them until the death of Closter, when the one addressed to Schutz was opened, and found to contain the said note for \$1,175, indorsed "R. G. Closter" in ink, and a note written in pencil upon a piece of another envelope in the following language, viz.: "Charlie, Dear Friend and Brother: Please see to, that Mrs. Bertha Vierea get the letter addressed to her, and advise her how to manage. Yours, R. G. Closter." The envelope addressed to Mrs. Vierea was opened later, and was found to contain a note of Charles Stubling and wife to the deceased. Until the Monday preceding the tragedy, Closter had been living at the home of Mrs. Vierea, but, owing to some misunderstanding, he went to live with Schutz under the arrangement heretofore related. Liebe testified that it was a habit of Closter's to indorse all his notes, but Schutz testified that he saw the note in question about a week prior, and that it was not then indorsed; that some time previous to that Closter was much discouraged touching his ability to collect the

note, and said to witness, "I don't think I will get anything out of it," and "I might as well give it to you." Witness also testified that Closter inquired of him whether, if he indorsed a note, he would have to transfer the mortgage also, and he told him that he thought the mortgage followed the note. Witness further stated that the indorsement appeared to have been freshly made. A will of the deceased was found bearing date March 30, 1893, by which he disposed of all his property, part to Mrs. Vierea, and other portions of it to three of plaintiff's children, and nominated plaintiff as executor.

Is there in this testimony sufficient to establish a gift of the note and mortgage by Closter to Schutz? The transaction is not supported by any valuable consideration, nor does anybody pretend that it is; so that, if there is no gift, Schutz's title must fail. Nor can it make any material difference what may be the quality of the gift, whether *inter vivos* or *causa mortis*, as the essential elements which go to establish it in either case are the same, in so far as the pivotal facts give caste to the transaction. There must be an intention in the donor to give, and a delivery, to pass the title. If *causa mortis*, these things must have been done under the apprehension of death from some present disease or some impending peril, but it is revocable and becomes void by recovery, escape from such peril, or the death of the donee before the donor: *Ridden v. Thrall*, 125 N. Y. 572 (11 L. R. A. 684, 21 Am. St. Rep. 758, 26 N. E. 627). We need only to consider the intention and the alleged delivery. That there was an intent to give we think is perfectly manifest from the evidence adduced. The inclosing of the indorsed promissory note in a sealed envelope, addressed to Schutz, together with the few lines written him touching the envelope addressed to Mrs. Vierea, indicates so strongly that such was the fact as to become insusceptible

of serious dispute. It was held in *Caldwell v. Wilson*, 2 Speer, 75, that "delivery (in case of gift) is a transfer of possession, either by actual tradition from hand to hand, or by an expression of the donor's willingness that the donee should take when the chattel was present, and in a situation to be taken by either party." This implies, as the facts of the case warrant, that the donor and donee shall also be mutually present. ANDREWS, J., in *Beaver v. Beaver*, 117 N. Y. 421-428 (15 Am. St. Rep. 531, 6 L. R. A. 403, 22 N. E. 940) says: "The delivery may be symbolical or actual; that is, by actually transferring the manual custody of the chattel to the donee, or giving to him the symbol which represents possession. In case of bonds, notes, or choses in action, the delivery of the instrument which represents the debt is a gift of the debt, if that is the intention." Many authorities concur in holding that a declaration of gift in writing, without a delivery of the chattel, is ineffectual to transfer title, because, not being founded upon a valuable consideration, the supposed contract is *nudum pactum*, and may be revoked at the will of the donor. And these, we are impressed, preponderate in weight of authority towards the establishment of the doctrine. See *Young v. Young*, 80 N. Y. 422 (36 Am. Rep. 634); *Beaver v. Beaver*, 117 N. Y. 421 (15 Am. St. Rep. 531, 22 N. E. 940, 6 L. R. A. 403); *In re Crawford*, 113 N. Y. 565 (5 L. R. A. 71, 21 N. E. 692); *Connor v. Trawick's Adm'r*, 37 Ala. 289 (79 Am. Dec. 58); *Wadd v. Hazelton*, 137 N. Y. 215 (21 L. R. A. 693, 33 Am. St. Rep. 707, 33 N. E. 143).

There must be a parting with the dominion over the subject matter of the pretended gift, with a present design that the title shall pass out of the donor and to the donee, and this so fully and completely, to all intents and purposes, that, if the donor again resumes control over it without the consent of the donee, he becomes a

trespasser, for which he incurs a liability over to the donee except after revocation of a gift *causa mortis*. And so essential is delivery as a factor in the transaction that it is said: "Intention cannot supply it; words cannot supply it; actions cannot supply it. It is an indispensable requisite, without which the gift fails, regardless of the consequences": Thornt. Gifts, § 131. See, also, *McCord's Adm'r v. McCord*, 77 Mo. 166 (46 Am. Rep. 9); *Smith v. Ferguson*, 90 Ind. 229 (46 Am. Rep. 216); *Hatch v. Atkinson*, 56 Me. 324 (96 Am. Dec. 464); *Wilcox v. Matteson*, 53 Wis. 23 (40 Am. Rep. 754, 9 N. W. 814); *Board of Sup'rs v. Auditor General*, 68 Mich. 659-665 (36 N. W. 794); *Gano v. Fisk*, 43 Ohio St. 462 (54 Am. Rep. 819, 3 N. E. 532). The reason for the rule requiring delivery is obvious, and is founded upon "grounds of public policy and convenience, and to prevent mistake and imposition": *Noble v. Smith*, 2 Johns. 52 (3 Am. Dec. 399).

Measured by the requirements of law, there was no delivery of the note to Schutz, nor does the fact that the note was indorsed dispense with its necessity. Such an indorsement, without consideration, could not have stronger force or operation than a parol gift or by writing not under seal. Whatever might have been Closter's intention in writing his name on the back of the note, he could revoke the gift before delivery simply by retaining the note, and Schutz could not assert title thereto until something else had been done to complete the transaction. It cannot be said that Closter ever parted with his dominion. If so, when did it occur? Assuredly not before he made the attempt upon his life, for Schutz was not present to receive it. Placing the note upon his table in the sealed envelope addressed to Schutz was not a relinquishment of possession, because it remained with him and under his complete and absolute control. He could,

at any instant, while conscious and in his right mind, have bestowed it upon any other person, at his liking, and Schutz could not have prevented, nor would it have been an invasion of any rights acquired by reason of the indorsement and ensealment within the addressed envelope. And there could have been none after the shooting, for the note was not taken from the table nor mentioned by the deceased. The case can be no stronger than if the sealed envelope had been found among his other effects, for it was upon his table and within a room occupied solely by him. It was his intention, no doubt, that Schutz should find and appropriate it, but the right to make an appropriation did not accrue within the lifetime of Closter, and Schutz cannot now claim the property as against Closter's personal representative. The decree of the court below will therefore be reversed, and one here entered foreclosing the mortgage.

REVERSED.

Decided October 17, 1898.

ON PETITION FOR REHEARING.

*[54 Pac. 662]

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

An elaborate and exhaustive petition for rehearing has been filed in this case, and we are constrained to review to some extent the salient points involved. Counsel say the gift was not consummated until the subject thereof reached the hands of Schutz, but that, having acquired possession of it prior to the death of Closter, it became his property at the instant of his taking possession. This view overlooks the fact that Closter was not then in a mental condition to bestow anything. It was Closter's purpose, no doubt, to make the donation in contempla-

tion of death, not that he understood the distinction between a *donatio mortis causa* and a gift *inter vivos*, but such was the nature of the plan adopted, which he supposed would effect a change of ownership in the property. Death was absolutely necessary to render the gift in that form irrevocable upon his part, for it must be remembered that such a gift is always conditional until the event in contemplation of which it is made has actually come to pass. This, as we have shown in the main opinion, is the distinctive element which determines the nature of the gift. The object was to make the gift, but to retain the title while living. None other is manifest from his acts. This becomes apparent from the fact of his leaving the subject thereof on the table in his own room for the donee to discover and appropriate after he had put an end to his own existence. But the gift must fail as a gift *causa mortis* simply because there was no delivery. It is said that the donee discovered the property and appropriated it while Closter was yet living, but it was not his intention that the donee should thus or otherwise appropriate it while he lived, so that its possession prior to Closter's death was obtained contrary to his manifest intention. True, there was an ultimate intention to give, but none of executing the gift at that specific time, or that it should be consummated in the particular manner which it is claimed is sufficient to complete the transaction and pass the title. The ultimate intention is plain enough, but the manner adopted for the consummation of the gift was legally insufficient, as it contemplated no change in title, either conditionally or unconditionally, prior to his decease. When Mr. Schutz possessed himself of the envelope and its contents he did that which the donor did not purpose should be done,—for it was designed, as we have said, that he should have them only after his death, not before; so

that he took them without the donor's consent, and there could be no delivery in the absence of such consent. If the note indorsed and inclosed in the envelope, addressed as it was, had been handed by Closter to Schutz without saying anything, the act would have disclosed the purpose of the donor, and the gift would have been complete, as the delivery would have been accomplished. So, it may be admitted that if Closter had left the note upon a stump, on a by-way, to use the illustration of counsel, intending that Schutz should come along and discover and appropriate it, when he had possessed himself of it, if within the lifetime of Closter, the delivery would have been completed and the gift consummated.

But suppose, in the first instance, Closter had subjoined a condition, when he handed the note to Schutz, that it should be and remain the property of the donor while living, and when dead it should pass to the donee; there would be no gift, because there would be no purpose of passing title within the lifetime of the donor. The transaction would partake of the nature of a testamentary disposition, but could not operate as a *donatio mortis causa*, or a gift *inter vivos*; as, in either case, the title must pass within the lifetime of the donor, although in the former it is subject to revocation. *Basket v. Hassell*, 107 U. S. 602, (2 Sup. Ct. 415.) So, in the second instance, suppose it was intended, and in some way made clearly apparent, that Schutz should, subsequent to the death of the donor, and in that event only, have possessed himself of the property, and then appropriated it, could it be said that there had been a delivery, if he had come by and obtained it prior to Closter's demise? In such case, like the one at bar, there would have been no intention that the title should thus pass, and without the intention there could have been no delivery prior to his death. A mere passing of the naked possession does not

come up to the requirements of a good delivery. It must be a transfer of the property with a purpose on the part of the donor to relinquish his dominion over it, and thereby to part with and divest himself of the title. A case of some analogy and illustrative of the principle is *Miller v. Jeffress*, 4 Grat. 472. There was a parol declaration by a party in his last illness of a gift of certain bonds which had been previously assigned to, and were then in the possession of, a certain firm of which the donee was a partner, but further than this there was no delivery of the subject of the intended gift. The court say, speaking through BALDWIN, J.: "A delivery is indispensable to the validity of a *donatio mortis causa*. It must be an actual delivery of the thing itself, as of a watch or a ring; or the means of getting the possession and enjoyment of the thing, as of the key of a trunk or a warehouse in which the subject of the gift is deposited; or, if the thing be in action, of the instrument by using which the chose is to be reduced into possession, as a bond, or a receipt, or the like. * * * It is not the possession of the donee, but the delivery to him by the donor, which is material in a *donatio mortis causa*. The delivery stands in the place of nuncupation, and must accompany and form a part of the gift. An after-acquired possession of the donee is nothing, and a previous continuing possession, though by the authority of the donor, is no better."

We quote again from Woods, J., in *Dickeschied v. Exchange Bank*, 28 W. Va. 340, who states the essentials to a valid gift *inter vivos* as well as those of a *donatio mortis causa*. He says: "Gifts *inter vivos* have no reference to the future, and go into immediate and absolute effect. To constitute such a gift, the donor must be divested of, and the donee invested with, the right of property in the subject of the gift. It must be absolute, irrevoc-

cable, without any reference to its taking effect at some future period. The donor must deliver the property, and part with all present and future dominion over it." Touching a gift *causa mortis*, he says: "There must be a delivery of the property to the donee, or to some other person for his use. The donor must part with all dominion over it, so that no further act of him, or of his personal representative, is necessary to vest the title perfectly in the donee; to belong to him presently, as his own property, in case the owner should die of his present illness, or from the impending peril, during the lifetime of the donee, and without making any change in relation to the gift." See, also, *Delmotte v. Taylor*, 1 Redf. Sur. 417; *Dunbar v. Dunbar*, 80 Me. 152 (6 Am. St. Rep. 166, 13 Atl. 578); *Bigelow v. Paton*, 4 Mich. 170; *Evans v. Lipscomb*, 31 Ga. 71; *Green v. Carlill*, 4 Ch. Div. 882. So that whether we look at the transaction in the light of authority, or examine it upon principle, it is not possible to sustain it as constituting a gift, — a completed, consummated act, — passing title to the donee.

The quotation from *Caldwell v. Wilson*, 2 Spears, 75, does not seem to be understood. Two methods of delivery are defined, — one, by actual tradition from hand to hand; the other, by an expression of the donor's willingness that the donee should take when the chattel was present and in a situation to be taken by either party. In the latter there is involved no actual transfer of possession. The donor says, "There is the chattel (it being present); take it"; and the donee assents. This, the authority holds, would be equivalent to an actual manual transfer of possession from hand to hand. Hence we said the definition implied the mutual presence of the donor and donee. Of course, the assent or acceptance of the donee may be through an agent. But in this case,

there being no agent for either party, there could have been no delivery until Schutz took manual possession, and it is the delivery accomplished by actual tradition from hand to hand that the counsel is contending for. The vice of the argument, however, lies in supposing that title passed at the instant the donee came into possession of the note and mortgage, it being before the donor had ceased to breathe, notwithstanding the fact that he was then irrational, and made no mention, either directly or indirectly, touching the property, or of its further disposal by him. It was the purpose of Closter to take his life instantly. If he had thus accomplished his purpose, it is admitted there would have been no delivery by reason of the donee's subsequently finding and appropriating the property. Although he lived some four days, he never manifested any other or further intention respecting it; so that we are relegated to the primary manifestation of his ultimate intention, and it leaves no new or additional act by which to signalize the transaction as a gift in any aspect. The petition will be denied.

REHEARING DENIED.

Decided at PENDLETON, 13 August, 1886.

MOSGROVE v. HARPER.

[54 Pac. 187.]

1. INDIAN LANDS—POWER OF SECRETARY OF INTERIOR.—The secretary of the Interior has no power to cancel a lease of land that has been allotted to an Indian, and by him leased pursuant to the prescribed regulations with the approval of such secretary, and this for at least three reasons: (1) The lessee has acquired a vested interest of which he cannot be deprived without some legal proceeding, (2) the power to cancel has not been conferred on the secretary by congress, and (3) the exercise of this unwarranted authority is not necessary for the protection of the Indians or the public, since the courts afford appropriate relief in cases of wrong.
2. ALLOTTED LAND—CANCELLATION OF LEASE.—The secretary of the Interior is not authorized by virtue of the provisions of the law giving him general supervision of the public business relating to Indian affairs and arising out

of Indian relations* to cancel a lease of allotted lands regularly made by an Indian under 26 Rev. Stat. U. S. 795.

3. *IDEM.*—Nor does the secretary derive such power from the law making him the superior officer of the land department with control over the proceedings for the acquirement of title to public lands.*
4. **POWER OF SECRETARY OF THE INTERIOR — CONSTRUCTION OF LEASE.**—A provision in a lease of allotted Indian lands that on the occurrence of certain contingencies the lease shall terminate and the lessor have the right of re-entry does not authorize the secretary of the interior to decide that such contingencies have happened — that question can be decided only by the courts.

From Umatilla: STEPHEN A. LOWELL, Judge.

Suit for an injunction by Matt. Mosgrove against Geo. W. Harper and Julia and D. St. Dennis to prevent the plaintiff from being forcibly ejected from a tract of land in the Umatilla Indian reservation. Plaintiff prevailed and defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *Robert J. Slater, John H. Hall*, United States attorney, and *William Parsons*, with an oral argument by *Mr. Slater*.

For respondent there was a brief over the name of *Balleray & Hailey*, with an oral argument by *Mr. John J. Balleray*.

MR. JUSTICE BEAN delivered the opinion.

This is an appeal from a decree restraining the defendant George W. Harper, United States Indian agent for the Umatilla Indian reservation, and his co-defendants,

*NOTE.—U. S. Rev. Stat. Sec. 441. "The secretary of the interior is charged with the supervision of public business relating to the following subjects: * * *

(2) The public lands including mines; (3) the Indians, etc. * * *

Sec. 462. "There shall be in the department of the interior a commissioner of Indian affairs who shall be appointed by the president. * * *

Sec. 463. "The commissioner of Indian affairs, under the direction of the secretary of the interior, and agreeable to such regulations as the president may prescribe, have the management of Indian affairs, and of all matters arising out of the Indian relations."—REPORTER.

from interfering with plaintiff's possession of eighty acres of land within the limits of such reservation which had been allotted to the defendant Julia St. Dennis, an Indian woman, under the act of congress of March 3, 1885 (23 Stat. 340), and by her leased to the plaintiff by virtue of the provisions of section 3 of the act of 1891 (26 Stat. 794), upon the terms and conditions prescribed by the secretary of the interior, and with his approval. About a year after the execution and approval of the lease, and after the plaintiff had entered into possession thereunder, the Indian allottee filed with the defendant Harper a petition alleging that the lease had been obtained from her by fraud and imposition ; that she had executed it under duress ; that plaintiff had not paid the rent as therein stipulated, and had suffered waste to be committed on the premises ; and asking that the secretary of the interior cancel and annul the lease, and restore her to the possession of the leased premises. By direction of the department of Indian affairs, the plaintiff was cited to show cause, if any he had, why the prayer of the petition should not be granted ; and, on a hearing, the secretary of the interior decided that the allegations thereof were true, ordered the lease canceled and annulled, and directed the local Indian agent to dispossess the plaintiff ; and he was engaged, with the assistance of his Indian police, in the summary execution of such order when this suit was commenced, and the only question presented thereby is whether the secretary of the interior had the power or authority to cancel or annul the lease after it had been approved by him. The general rule that the only tribunal authorized to cancel or annul a contract is a court of competent jurisdiction is not questioned by counsel for the defendants ; but he contends that the secretary of the interior had the right to cancel the lease in question by virtue of the treaties

and acts of congress under which the title to the premises is held and was leased by the allottee, and his general supervision and control of Indian affairs, as well as by virtue of the terms of the lease itself.

By a treaty between the United States and the Walla Walla, Cayuse and Umatilla tribes of Indians, concluded on June 9, 1855 (12 Stat. 945), the several tribes ceded to the United States all the land formerly occupied by them except a particularly described portion thereof in what is now Umatilla County, which it was stipulated should be set apart as a residence for the exclusive use of such Indians, and, for the purposes contemplated, should "be held and regarded as an Indian reservation." Soon after the conclusion of this treaty, the several tribes went on the land set apart and reserved for them, and have ever since continued to live thereon under the charge and control of Indian agents appointed by the general government from time to time to supervise their affairs. By the allotment act of March 3, 1885 (23 Stat. 340), it is provided that the lands set apart as therein required "shall thereafter constitute the reservation for said Indians, and within which the allotments herein provided for shall be made," and that the president shall cause patents to issue to the allottees, "which shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Oregon, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and freed of all charge or incumbrance whatsoever." It is also declared that "if any conveyance is made of the land set apart and allot-

ted as herein provided, or any contract made touching the same, or any lien thereon created before the issuing of the patent herein provided, such conveyance, contract, or lien shall be absolutely null and void." Congress subsequently provided, however, that whenever it shall be made to appear to the secretary of the interior that, by reason of age or other disability, any allottee of Indian lands cannot personally and with benefit to himself occupy or improve his allotment, or any part thereof, the same may be leased "upon such terms, regulations, and conditions as shall be prescribed" by such secretary for a term not exceeding three (afterwards enlarged to five) years, for farming or grazing purposes (26 Stat. 795); and under this statute the lease in question was made.

1. It is manifest, we think, from an inspection of the various acts to which reference has been made, that congress has not, by any provisions therein, either directly or indirectly empowered or authorized the secretary of the interior or any other special tribunal to cancel or annul a lease made by an Indian allottee after the same has been approved by him. It can be made in the first instance only under certain circumstances, and by the consent and approval of such officer; but after it has been executed by an allottee competent to enter into such an agreement, and has been approved, it becomes a completed contract, binding upon all the parties, and can be cancelled or abrogated only in the same manner, for the same reason, and by the same tribunal, as any other similar contract. The land, it is true, notwithstanding the allotment, is within an Indian reservation, and it and the allottee are under the general supervision and control of the secretary of the interior; but this power of supervision is not an absolute or unlimited one. It clearly cannot be exercised to deprive any person of the

right lawfully acquired under a lease made with the allottee in the manner provided by law. By such a contract the lessee secures a vested interest, of which he can no more be deprived by an order of the secretary of the interior than he can be deprived by such order of any other property lawfully acquired. If the lease is secured through fraud or imposition, the courts of the country are open to the injured party, and the question involved can there be tried out, under the forms of law and according to the procedure provided in such cases, but the secretary of the interior has been vested with no power or authority to right the wrong. His authority over the matter, so far as the validity of the contract is concerned, ceased when it was entered into by a person competent to make such a contract with his consent, and according to the rules and regulations prescribed by him.

But it is urged that the leases of Indian lands are sometimes secured by fraud and imposition, and are often imprudently entered into by the allottee, and therefore public injury and individual hardship will ensue if the secretary of the interior, who has general charge and supervision of Indian affairs, has no authority to cancel and annul such a contract when made by the wards of the government, and to summarily eject the lessee from the land. But a sufficient answer to this contention is that no such power has been conferred upon him, and that the courts of the country are constituted for the purpose of administering appropriate relief in such cases. And the assumption of a power not conferred by law finds no justification in the fact that a mischief may be thereby suppressed, or a particular right maintained. If, in the administration of Indian affairs, such a power ought to have been vested in the secretary of the interior over contracts of leasing made by the allottees, congress

alone could have conferred it. But, no such power having been conferred, its existence must be denied.

2. It is sought to find authority for the action of the secretary of the interior in the provisions of the law giving him general supervision of the public business relating to Indian affairs, and arising out of Indian relations. But, as already intimated, the power thus conferred does not authorize him to deprive any person of vested rights acquired under a contract lawfully made with an Indian, whether it be a contract of leasing or any other valid contract.

3. Nor do we think any support for the position of counsel for the defendants can be found in the holdings of the federal courts touching the power of the secretary of the interior as the superior officer of the land department over the proceedings provided by law for the acquisition of title to the public lands. The land department is charged with the duty of supervising the disposition of the public domain; and so long as the legal title remains in the government, and the proceedings for acquiring it are *in fieri*, it has jurisdiction to hear and determine questions arising therein; but its power ceases whenever the last official act necessary to perfect the title to the successful claimant has been performed. Thereafter any wrong which may result from the action of the department must be corrected by the courts: *U. S. v. Schurz*, 102 U. S. 378; *Moore v. Robbins*, 96 U. S. 530. So, in the case at bar, so long as the proceedings looking to the leasing of land by an Indian allottee are *in fieri*, the power and jurisdiction of the secretary of the interior over the matter is exclusive, and he can prescribe such rules and regulations in reference thereto as he may deem necessary. Indeed, no valid lease can be made by

such allottee without his consent: *Beck v. Flournoy Livestock Co.*, 12 C. C. A. 497, 65 Fed. 30; *U. S. v. Flournoy Livestock Co.*, 69 Fed. 886; *Id.*, 71 Fed. 576. But after it is once regularly executed, containing such terms and provisions as he may prescribe, and has been approved by him, his jurisdiction over the validity and terms of the contract ceases.

4. It is also claimed that he had power to cancel and annul the lease for non-payment of rent, and for the commission of waste on the leased premises; but we can find no warrant in law nor in the provisions of the lease itself to support such claim. By the terms of the lease, which was evidently prepared in the department of the interior, and is very carefully drawn, all the parties thereto covenant and agree that it is made with the express proviso that if any of the rent shall remain unpaid for thirty days after the same shall have become payable, or if the lessee shall, in violation of his agreement, and without the consent of the lessor and the secretary of the interior, assign the lease, or underlet or otherwise dispose of the whole or any part of the leased premises, or use the same for purposes other than those provided for in the lease, or shall commit waste or suffer it to be committed on such premises, or misuse or fail to take proper care of the same, or shall pay or surrender the rent to any person other than the lessor or her executor or administrator or such person as she may assign the same to, with the approval of the secretary of the interior, or such person as the secretary of the interior may appoint to receive the same, or shall fail to keep and perform any other agreement or covenant contained in the lease, it shall thereupon expire, at the option or election of the party of the first part, or her executors, administrators or assigns, with the approval of the secre-

tary of the interior, without notice or demand, and she may re-enter upon the premises and repossess and recover the same to all intents and purposes as though the lessee had never occupied the same, and, without such re-entry, and without demand for rent, she may recover possession thereof, in the manner prescribed by law relating to proceedings in such cases. The effect of these several provisions is that, upon the happening of either or any of the events therein specified, the lease shall terminate at the option of the lessor, and she shall have the immediate right to re-enter and repossess the leased premises. But we know of no provision of law, and none has been called to our attention, which authorizes the secretary of the interior to adjudge and determine that the contingencies upon which the lease should terminate have happened. That is a matter which belongs to the judicial, and not the executive, department of the government. The right of the lessor, when denied, to re-enter and take possession of the leased premises under and by virtue of the several provisions of the lease, can only be tried out in a court of law, and not by some executive department of the government. It follows from these views that the decree of the court below is right, and must be affirmed.

AFFIRMED.

Decided at PENDLETON, 13 August, 1888.

SULLIVAN v. CLINE.

[54 Pac. 154]

ESTABLISHING HIGHWAYS—CONSTITUTIONAL LAW.—Sections 4075-4079, Hill's Ann. Laws, providing for the establishment of roads of public easement to private residences by condemning private property therefor, are not invalid because they made no provision for notice to a non-consenting landlord of the intended application for a road, since at a subsequent stage of the proceedings he may appeal from the award of damages to a court of general jurisdiction: *Towns v. Klamath County*, 38 Or. 225, followed.

33	260
37	377

33	260
48	618

HIGHWAYS—PUBLIC USE.—Sections 4075-4079, Hill's Ann. Laws, providing for locating a county road from residences not reached by a convenient road to some other public road, are not unconstitutional as condemning private property for private use, since the road when open will be at the disposal of the entire public: *Towns v. Klamath County*, 33 Or. 225, followed.

SUFFICIENCY OF PETITION.—A petition in a proceeding for the location of a road of public easement setting out the location of petitioner's residence in reference to its proximity and accessibility to any established highway, the impossibility of obtaining the location of a public road under the general road laws for want of a sufficient number of resident petitioners, that at the time of his settlement there was along the route of the proposed road a well-established highway over public lands which had subsequently to his settlement come into the possession of one who refused to permit the petitioner or the public to travel over such road, and alleging that his residence cannot be reached by or for travel by any convenient or other public road previously provided by law, and that it is necessary for the public and the petitioner to have access to and egress from his residence, is sufficient.

From Union: ROBERT EAKIN, Judge.

Action by Armittie H. Sullivan against A. W. Cline and others. From a judgment setting aside proceedings of the county court on a writ of review, defendants appeal.

For appellants there was brief over the name of *Finn & Ivanhoe*, with an oral argument by *Mr. F. S. Ivanhoe*.

For respondent there was a brief over the name of *Baker & Baker*, with an oral argument by *Mr. J. S. Baker*.

MR. JUSTICE BEAN delivered the opinion.

This is an appeal from a judgment of the circuit court for Union County annulling and setting aside, on writ of review, the proceedings of the county court of such county in the matter of the location of a road of public easement over and across the land of plaintiff. It is urged by counsel, in support of the rulings of the court below, that the act of the legislature under which the road was located is unconstitutional for want of a provision for sufficient notice to a non consenting landowner, and be-

cause the use for which the property is to be taken is not public, but private. These objections were both held unsound in the case of *Towns v. Klamath Co.* (decided since this case was argued and submitted), 53 Pac. 604, and hence may be passed without further notice.

It is also claimed that the petition for the location of the road is insufficient to give the county court jurisdiction of the subject matter, because it does not state in detail the facts showing that it is necessary that the public and the petitioner shall have ingress to, and egress from, the residence of such petitioner. The petition sets out at length the situation and location of petitioner's residence in reference to its proximity and accessibility to any established public highway; the impossibility of obtaining the location of a public road under the general road laws, for want of a sufficient number of resident petitioners; that at the time of his settlement upon his homestead there was along the route of the proposed road an old and well-established highway over and across the adjacent public lands which for more than 15 years had been continuously used by the public, but that the plaintiff had, subsequent to his settlement and prior to the filing of the petition, become the owner of the land over which such road passed, and has inclosed the same, and now refuses to permit the petitioner or the public to travel over such road, or over and across such lands, and that his "residence cannot be reached by or for travel by any convenient or other public road heretofore provided by law or otherwise, and that it is necessary for the public and your petitioner to have ingress to, and egress from," his residence. In our opinion, this is a sufficient statement of the essential facts required to be shown by the petition to satisfy the requirements of the law. It is not contemplated or required that the petitioner for a road of public easement should be required to set out

at length in his petition the evidentiary facts going to show that his residence is not or cannot be reached by any convenient public road, or that it is necessary that the public and himself shall have ingress to, and egress from, his residence, but it is sufficient if he avers the ultimate facts showing his right to the relief prayed for. It follows that the judgment of the court below must be reversed, and the cause remanded, with directions to dismiss the writ.

REVERSED.

Decided at PENDLETON, 13 August, 1898.

GRAHAM v. SCHOOL DISTRICT.

[54 Pac. 185]

1. SCHOOL DIRECTORS—RATIFICATION OF CONTRACT.—A contract for the employment of a teacher for a specified term executed at a special meeting of school directors irregularly called at which the directors were not all present is ratified so as to be binding upon the school district by the payment of the salary for part of the term with the approval and acquiescence of the board.
2. SCHOOLS—ACTS OF DE FACTO DIRECTOR.*—A school director, although he has removed from the district, will be considered a *de facto* officer so far as the rights of third persons are concerned, where he continued to act as a director and exercised the duties pertaining to the office: *Hamlin v. Kassafer*, 15 Or. 466, applied.

From Umatilla: STEPHEN A. LOWELL, Judge.

*NOTE.—For decisions on whether changing residence will vacate an office, see *State v. Craig*, (Ind.), 32 Am. St. Rep. 287 (with note).

The acts of a *de facto* official are usually upheld when they concern the public or third persons who have an interest in the thing done: *Hamlin v. Kassafer* (Or.), 3 Am. St. Rep. 176 (and note); *Jewell v. Gilbert* (N. H.), 10 Am. St. Rep. 357; *State ex rel. v. Taylor* (N. C.), 23 Am. St. Rep. 51 (with note), 12 L. R. A. 202; *Mugnean v. City of Fremont* (Neb.), 27 Am. St. Rep. 436 (with note), 9 L. R. A. 786; *Gorman v. People* (Colo.), 31 Am. St. Rep. 350; *King v. Philadelphia* (Pa.), 21 L. R. A. 141, 35 Am. St. Rep. 817; *Weatherford v. State* (Tex.), 37 Am. St. Rep. 828 (with note).

An extensive collection of authorities showing what classes of persons are *de facto* officers and the distinction between *de facto* and *de jure* officers will be found in the notes to the following cases: *State v. Lewis* (N. C.), 11 L. R. A. 106; *State ex rel. v. Taylor* (N. C.), 12 L. R. A. 202, 23 Am. St. Rep. 51; *State ex rel. v. Carr* (Ind.), 13 L. R. A. 177; *Hamlin v. Kassafer* (Or.), 3 Am. St. Rep. 183; *Creigh-*

Action on a contract by Effie Graham against School District No. 69. Defendant had a verdict by direction by order of the court.

REVERSED.

For appellant there was a brief over the name of *Carter & Raley*, with an oral argument by *Mr. J. H. Raley*.

For respondent there was a brief over the name of *Balleray & Hailey*, with an oral argument by *Mr. John J. Balleray*.

MR. JUSTICE WOLVERTON delivered the opinion.

Plaintiff brought this action upon a contract alleged to have been entered into between her and the defendant to recover for services rendered as teacher. The contract was for a term of seven months, beginning September 28, 1896, at the rate of \$35 per month. She acknowledges payment for four months and demands judgment for a balance of \$105. After all the evidence was submitted the court directed the jury to return a verdict for the defendant, upon the ground that plaintiff had failed to prove the contract sued upon. It appears from the pleadings that John Dand, Frank Snyder and Joseph Hanscom were the duly qualified and acting directors

ton v. Com. (Ky.), 4 Am. St. Rep. 147; *Dabney v. Hudson* (Miss.), 24 Am. St. Rep. 278; *Waterman v. Chicago etc. Railroad Co.* (Ill.), 32 Am. St. Rep. 228; *Walcott v. Wells* (Nev.), 37 Am. St. Rep. 404; *Weatherford v. State* (Tex.), 37 Am. St. Rep. 832; *State v. Noyes* (Wis.), 41 Am. St. Rep. 51; *City of Tampa v. Kauntz* (Fla.), 68 Am. St. Rep. 210; *Parker v. State* (Ind.), 18 L. R. A. 587.

As to the right of an officer *de jure* to the official salary when the office is actually occupied by another person, see a critical note to the case of *Andrews v. Portland* (Me.), 10 Am. St. Rep. 24. Other cases on the same point are *State ex rel. v. Carr* (Ind.), 28 Am. St. Rep. 163, 13 L. R. A. 177 (with note); *Ward v. Marshall* (Cal.), 31 Am. St. Rep. 198; *Scott v. Crump* (Mich.), 58 Am. St. Rep. 478.

Touching the question whether a *de jure* officer can recover from an intruder the salary and emoluments of the office, see *Beier v. Gorrell* (W. Va.), 8 Am. St. Rep. 22; *Waterman v. Chicago etc. Railroad Co.* (Ill.), 32 Am. St. Rep. 228.—REPORTER.

of the defendant from long prior to September 28, 1896, to November 3d of the same year, and there was evidence to the following purport: The plaintiff was authorized to teach in the district school by verbal arrangement with Dand, who represented that he had consulted the other two directors touching the matter, and in pursuance of such authorization began teaching September 28, 1896. On the 13th of October following, the three directors met at the house of Mr. Sherman, the clerk of the district, for the purpose of drawing up, and entering formally into, the contract with plaintiff, at which meeting its terms were discussed, but, owing to a disagreement respecting who was the legally authorized chairman, they adjourned without the transaction of any business. Subsequently, on November 4th, Dand and Snyder met at the schoolhouse, without notice to Hanscom, and, the clerk not being present, the plaintiff acted in his stead; at which meeting the contract sued on was drawn up and signed by the two directors and the plaintiff. The plaintiff continued teaching to the end of the term. She was paid four months' salary, in monthly installments, by warrants drawn upon the clerk, and signed by Hanscom as chairman of the board of directors. Shortly after the contract was signed, Hanscom told the plaintiff he was willing to have her teach the school as long as they had money, and to sign the contract for five months, but not for seven, and about the fifth month informed her that she could not collect her wages off the district. Snyder testified that at the time of the November meeting he was director of the district; that he was moving at the time into another district, some four miles distant; that he had moved some of his goods and taken his family away on the 3d, and moved the remaining goods on the day of the meeting.

1. Upon this state of the record, the defendant contends that it is conclusively shown that the pretended meeting of November 4 was not a regular meeting, nor was it a special meeting regularly called, and, further, that Snyder was not a director of the district at the time, and was without right or authority to act as such, and hence that the alleged contract was not lawfully authorized or executed. The plaintiff, while not conceding the correctness of this conclusion, nevertheless claims that, if it were tenable, the defendant subsequently ratified the contract, and is now estopped to deny its efficacy. The statute (Hill's Ann. Laws, § 2602, subd. 16) provides as follows: "Two directors shall constitute a quorum. Any duty imposed upon the board as a body must be performed at a regular or special meeting, and must be made a matter of record. The consent of the board to any particular measure, obtained of individual members when not in session, is not the act of the board, and is not binding upon the district. If a contract is made without authority from the board, the individuals making such contract shall be personally liable." Subdivision 14 of the same section provides that the directors when employing teachers, shall enter into a written contract with them, to which contract the assent of both parties must be given in writing. It is plain that these subdivisions were intended to prescribe the mode and manner by which school districts shall contract with teachers for their services, and a contract entered into in violation of their provisions is not susceptible of enforcement: *Hazen v. Lerche*, 47 Mich. 626, (11 N. W. 413).

But school boards are not unlike the governing boards of other municipalities and corporations, and may by their subsequent acts so adopt or ratify contracts within the scope of their powers, informally entered into or executed, that the districts for which they act will be

estopped to deny their validity. In *Athearn v. Independent Dist.*, 33 Iowa, 105, it was said: "Performance of a contract, permission to the party with whom the corporation contracts to perform, the acceptance of the performance or of the fruits of the performance by the corporation, acquiescence in the contract, payment to the other party, and the like, all operate as acts of ratification." The facts of the case, in so far as they have application to the case at bar, were these: Upon the trial it was proved that the persons signing the instrument, and the approval indorsed thereon, in behalf of the defendant, were the acting officers of the defendant, that they signed their names separately and severally to the paper, and that under the contract a school was taught by plaintiff for a part of the time stipulated, for which plaintiff was paid by an order signed by the secretary, and drawn upon the treasurer and by him paid. The defendant offered to show, both by the records and by oral proof, that there was no record of any action of the board of directors authorizing the execution of the contract, or ratifying it after it was executed, that there was no meeting of the board at the time the contract purported to have been executed, and that the contract was in fact separately signed by the several officers of defendant at their places of business, or in the street, and was not done as the act of the board of directors. The evidence was rejected. Under this state of facts, the court, in affirming the judgment, say, "But, if we concede that the contract was executed without authority upon the part of defendant's officers, it has nevertheless been ratified by defendant, and thereby became a binding instrument," and that the "defendant's act in permitting plaintiff to perform partly his contract, and in paying him for his services rendered under the contract, as well as the acquiescence of defendant's board of directors in

the contract, with the knowledge thereof, and failure to dissent therefrom, amount to a ratification whereby defendant became bound upon the contract." This doctrine was reaffirmed in *Cook v. Independent School Dist.*, 40 Iowa, 444.

A like doctrine was held in *Crane v. Bennington School Dist.*, 61 Mich. 299 (28 N. W. 105); and, as the case bears much analogy to the one at bar, we may be pardoned if we quote somewhat at length from the opinion of the court, speaking through MORSE, J., who says: "When it was admitted without any dispute that the plaintiff taught under this contract for ten weeks, with the sanction and consent of the officers, and that orders were drawn by the proper officers for his pay as such teacher, and cashed by the assessor, who did not sign the contract, without any objection, it became entirely immaterial what the book of record showed, or whether there was any corporate action in hiring him or authorizing the contract. The defendant must be held not only estopped by the action of its officers from questioning the validity of the contract, but treated as having fully ratified and confirmed it. School district officers cannot be permitted by the law to enter into a written contract with a teacher, none of them denying its validity for ten weeks, or half the term, but recognizing it by making payments upon it, in which payments all join, and then, after the teacher, in the utmost good faith and reliance upon the contract, has taught that length of time, discharge him without cause, and plead in bar of his payment under the contract that they never met and consulted nor took corporate action in hiring him, or made any record in a book of the execution of the contract. It appears very clearly in this case that a majority of the school board assented to this contract in the first place, as evidenced by their executing it. It was after-

wards ratified by all three of them. It was not necessary that there should be a direct proceeding with an express intent to ratify. 'It may be done indirectly and by acts of recognition or acquiescence, or acts inconsistent with repudiation or disapproval.' See *Scott v. Methodist Church*, 50 Mich. 532 (15 N. W. 891), and cases there cited.

"It was not necessary that these three officers should formally meet together, pass a resolution confirming the contract, and record it, in order to ratify the action of the moderator and director in hiring the plaintiff and executing the contract sued upon. Their acts in drawing and paying the orders without any demur or protest were a sufficient recognition and approval of the contract. If the assessor had refused payment of the first order drawn, the case might have come within the ruling of *Hazen v. Lerche*, 47 Mich. 626 (11 N. W. 413); but here the agreement was acted upon by everybody until other controversies arose, and then it was too late to take exception to the want of formalities in engaging the teacher or executing the contract." See, also, *Holloway v. School Dist.*, 62 Mich. 153 (28 N. W. 764),—a later case by the same court, which was declared to come within the principle thus announced.

2. There is one feature of the case at bar which does not seem to be entirely covered by the foregoing authorities, and that concerns the question made touching the authority of Snyder to act as director of the district on November 4, the date upon which the contract purports to have been signed. But if it be conceded that Snyder's removal from the district *ipso facto* operated as a vacation of his office, and that he had actually effectuated a change of residence at the time, yet the testimony is clear that he assumed and continued to act in the capacity of

director, and exercised duties pertaining to the office, as though no change had taken place affecting his right or authority in the premises; and we think he must be treated as a *de facto* officer, in so far as his acts may affect the plaintiff,—she being a third party,—and that the case falls within the reasoning of *Hamlin v. Kassafer*, 15 Or. 456 (15 Pac. 778, 3 Am. St. Rep. 176).

From these considerations it is apparent that there was evidence pertinent to go to the jury upon the question of ratification, and it was error, therefore, to direct a verdict for defendant for want of a legal contract in the first instance. The judgment will be reversed, and the cause remanded for such other proceedings as may seem proper.

REVERSED.

Decided at PENDLETON, 13 August, 1888.

SWEET v. JORGENSEN.

[54 Pac. 156]

1. COLLATERAL ATTACK—JURISDICTION.—An action for trespass on plaintiff's premises defended on the ground that defendant entered on an established public road by authority of the road supervisor is a collateral attack on the proceeding establishing the road, and the only question which can be considered is that of the jurisdiction of the county court in the establishment of the road: *Bewley v. Graves*, 17 Or. 174, applied.
2. HIGHWAYS—SUFFICIENCY OF NOTICE.—Notice that, at a session of the "county court for — county," a petition will be presented to "said court" to establish a road "within said county" along a certain line in H. county, sufficiently shows, as against collateral attack, that the petition is to be presented to the county court of H. county.
3. EVIDENCE OF POSTING NOTICES.—Posting of notices in three public places within the vicinity of a proposed road is sufficiently shown by affidavits designating the places where notices were posted, as a barn on the line of road, the barn of V. and a fence at the east end of the road, and a recital in the journal entry of the court appointing viewers that it appeared that the notice had been posted in "three of the most public places along the line of the proposed road": *Latimer v. Tillamook County*, 22 Or. 291, and *Cameron v. Wasco County*, 27 Or. 318, applied.

From Harney: MORTON D. CLIFFORD, Judge.

Action by C. A. Sweet against W. N. Jorgensen, but defendant has judgment.

AFFIRMED.

For appellant there was a brief over the names of *Jas. A. Fee* and *Thornton Williams*, with an oral argument by *Mr. Fee*.

For respondent there was a brief over the names of *Lionel R. Webster* and *John W. Biggs*, with an oral argument by *Mr. Webster*.

MR. JUSTICE WOLVERTON delivered the opinion of the court.

1. This is an action to recover damages for trespass upon certain premises of the plaintiff. The defendant justifies by showing that he entered upon an established public road running across said premises under the direction and by authority of the road supervisor, and removed certain fencing, for the purpose of opening such road to public travel, and this proceeding challenges the validity of its establishment. The attack is collateral in its nature, and hence our inquiry must necessarily be confined to the question of jurisdiction of the county court in the premises. *Bewley v. Graves*, 17 Or. 274, 20 Pac. 322.

2. Two reasons are urged why jurisdiction did not attach. One arises upon the form and sufficiency of the notice, and the other upon the sufficiency of the record to show that it was posted in three public places in the vicinity of the proposed road, as required by law. The notice is in the following form: "To All Persons Concerned: You, and each and all of you, will take notice that the undersigned householders for Harney County,

Oregon, residing in the vicinity where the hereinafter described road is proposed to be, will at the next session of the county court for ——— County, Oregon, to wit, on Wednesday, the 4th day of November, A. D. 1896, respectfully present to said court a petition praying said court to lay out, alter, and establish a county road, within said county, on the following line or route, to wit: Beginning at the southeast corner of section seven, township twenty-three S., of R. 31 E., W. M., in Harney County, Oregon; thence, due west one-half mile, along the line between sections seven and eighteen, township twenty-three, range thirty-one, to the southeast corner of the southwest fourth of section seven, township 23, R. 31 E., W. M."

It is claimed that because of the blank appearing in the notice following the word "for," and preceding the word "county," there is no sufficient indication respecting the court to which it was intended to present the petition. Just why the name of the county was not filled in, whether from oversight, clerical misprision, or other cause, does not appear, but, from an inspection of the notice, there can be no possible doubt touching the name intended to have been inserted. The wording of the notice following the blank demonstrates the proposition. We quote again a portion of the notice: "Will * * * respectfully present to said court a petition praying said court to lay out, alter, and establish a county road, within said county, on the following line or route to wit: Beginning at the southeast corner of section seven, township twenty-three S., of R. 31 E., W. M., in Harney County, Oregon; thence," etc. Thus, it is apparent that the proposed road lies within the county in which the court was holden to which it was intended to present the petition, which was the County of Harney, as shown by the notice itself. Such being the case, no one could have

been misled by the oversight or neglect to fill in the name of the County of Harney before posting, and we think the notice is legally sufficient when brought in question collaterally.

3. As concerns the second contention, the affidavit of S. W. Miller shows that he posted notices, one "on the south side of the old stage barn on the line of the proposed road, and one at the court-house door in Burns, in said Harney County and State of Oregon"; the affidavit of C. H. Voegtly that he posted one on his barn in Burns, Or.; and that of J. W. Biggs, that he posted one "on a fence post at or near the east end of said proposed road"; and the journal entry of the court appointing viewers contains the following recital: "And it further appearing the notice of posting said petition at this time has been fully given, as required by law, for more than thirty days prior thereto, by posting notice thereof, duly signed by more than twelve of the lawful petitioners, in three of the most public places along the line of said proposed road, one of said notices tacked to C. H. Voegtly's barn, one of said notices tacked to a fence post at or near the east end of said proposed road, and one of said notices on the south side of the old stage barn on the line of the proposed road, and also by posting one of such notices for such period of time at the place of holding court." This record is quite sufficient, by legal intendment, to show a posting in three public places within the vicinity of the proposed road, within the authority of *Latimer v. Tillamook County*, 22 Or. 291 (29 Pac. 734), and *Cameron v. Wasco County*, 27 Or. 318 (41 Pac. 160).

The distinction sought to be made touching the opinion in the *Latimer* case, that it was rendered solely with reference to the ambiguity produced by the use of the word

“terminus” instead of “termini” in the notice is untenable. It will be noticed that the affidavits in that case recited that the three notices were posted in public places in the vicinity of the proposed road, one each at the “terminus,” which states a conclusion only, as it respects the public places of their posting. But the journal entry recites the posting of such notices, “all of which were in public places in the vicinity of said proposed road, and that these facts were made satisfactorily to appear to the court,” thus indicating, in effect, that it is sufficient if it be made satisfactorily to appear to the court that the posting was in public places within the vicinity of the road by evidence at the hearing otherwise than by affidavit. So it was held “that the proofs on file, with the findings in the journal entry, sufficiently show that the court had acquired jurisdiction.” The affidavits and journal entry in the case at bar show, with even greater particularity than in that case, the places of posting, and the entry recites that they were in the “most public places along the line of said proposed road”; so we have a much stronger case than was there presented. The judgment of the court below must therefore be affirmed.

AFFIRMED.

Decided at PENDLETON, 13 August, 1888.

BARNHART v. EHRHART.

[54 Pac. 195]

TRESPASS—PLEADING AND PROOF.—In trespass, where land is described as a particular lot, without giving metes and bounds, the evidence must be confined solely to that lot, and will not include trespass on other realty belonging to plaintiff.

SURVEYS—MEANDERED LINES—BOUNDARY.*—Where a government surveyor fails to include large tracts of land lying between the meander line as run

* NOTE.—In 42 L. R. A. 502 is an exhaustive collection of authorities on the effect of bounding a grant by a stream or tide water, showing both the rule and the exceptions thereto. See also the valuable note on waters as boundary lines, in 27 Am. St. Rep. 56.—REPORTER.

88	274
136	58
86	319
88	274
88	308
88	274
89	313
88	274
48	114
33	274
45	573

and the stream, the patents for lots along such line, though referring for identification to the official plat of such survey, which represents the meander line as the border of the water, are grants only to the meander line actually run.

DISPUTABLE PRESUMPTION — GOVERNMENT SURVEY.—Under the general presumption that official duty has been performed it will be supposed that a line appearing on a government map was by the official who surveyed the ground actually run as shown, but this may be disputed.

From Umatilla : STEPHEN A. LOWELL, Judge.

Trespass by Geo. A. Barnhart against Geo. Ehrhart, in which plaintiff recovered a judgment for five dollars. Defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Carter & Raley*, with an oral argument by *Mr. J. H. Raley*.

For respondent there was a brief and an oral argument by *Mr. John J. Balleray*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is an action to recover damages for an alleged trespass. It is alleged in the complaint that about July 1, 1896, plaintiff was the owner and in the possession of lots 3 and 4 of section 21, and lots 5, 6, 7 and 8 of section 22, in township 3, of range 33 E. of the Willamette meridian, in Umatilla County ; that about July 1, 1896, defendant wrongfully entered upon said premises, broke down the enclosures thereof, trampled upon the grass, dug up the soil, and erected a building thereon, to plaintiff's damage in the sum of \$250. The answer having put in issue the allegations of the complaint, a trial was had, resulting in a verdict and judgment for plaintiff in the sum of \$5, from which defendant appeals.

The evidence tends to show that plaintiff is the owner

in fee simple of said lots, as evidenced by patents from the United States to William H. Barnhart and Robert A. Batty, from whom he derives title, either directly or by mesne conveyances. It also appears that Wild Horse Creek flows in a southwesterly direction through said sections and township, and forms the northern boundary of a part of the Umatilla Indian reservation. The township was originally surveyed in November, 1864, and the field notes thereof show that the dry bed of a creek crosses the east boundary of section 22 at a point 25 chains and 80 links north of the southeast corner of said section; that it crosses the line between sections 21 and 22 at a point 20 chains and 40 links north of the south boundary of said sections; and also crosses the south boundary of section 21 at a point 36 chains and 50 links west of the southeast corner of said section. A plat of this survey, prepared from the field notes, was approved by the surveyor-general January 24, 1865, but this plat was amended from the field notes of a survey made in June, 1871, of the exterior boundaries of the Umatilla Indian reservation, and a line, representing this survey, is traced on the original plat of said township, which crosses said sections at the points indicated in the original field notes as "the dry bed of a creek," on the north side of which the territory is represented as being divided into lots which are numbered as described in the complaint, and contain the quantity of land stated in the grants from the United States. This plat, as amended, was reapproved June 21, 1872, and a tracing therefrom, containing said sections, certified to by the surveyor-general, being in evidence, tends to show that it is the "official plat of the survey of said lands, returned to the general land office by the surveyor-general," as recited in said patents.

The course of Wild Horse Creek was meandered in

September, 1887, and from the field notes of the survey thereof another plat was made, which was approved June 14, 1890; and a tracing therefrom, showing said sections, certified to by the surveyor-general, was introduced in evidence, and tends to show that said meander line crosses the section lines at the points indicated as "the dry bed of a creek," but there is quite a divergence between these plats as to the location of said creek and the exterior boundary of the reservation at all other points. The line representing the boundary of the reservation on the amended plat commences at the east boundary of section 22, and runs thence in a northwesterly direction to the center of said section, thence in a southwesterly direction until it crosses the line between sections 21 and 22, thence west and thence south to the south boundary of section 21; while the meander line of said stream as represented on the last plat begins at the same point as on the preceding plat, but curves in opposite directions; then, converging, intersects the lines at the points indicated. J. W. Kimball, the county surveyor of said county, appearing as a witness for the defendant, testifies, in substance, that he resurveyed that part of the exterior boundary line of the Umatilla Indian reservation running through section 22, as shown by the field notes from which the plat approved June 21, 1871, was prepared, and that he also retraced the meander line of Wild Horse Creek through said section 22, as appears by the field notes which formed the basis of the plat approved June 14, 1890, and that these lines were situated in places from a quarter to a third of a mile apart; and that, if the south boundary of the lots described in the complaint, which contain 134.14 acres, was extended to said creek, the land so included would be 152.76 acres more than is indicated on the official plat, and recited in the patents. This witness, however, does not say that

he found any evidence of the survey of the exterior boundary of said reservation, the field notes of which formed the basis of the amended plat. Plaintiff testifies that the lots described in the complaint are bounded by Wild Horse Creek, and that he has been in possession of the tract of land lying north of said creek about 30 years.

It will be observed from this testimony and other evidence that plaintiff contended at the trial that the lots described in the complaint extended to Wild Horse Creek, while defendant maintained that lying between these lots and said creek was a tract of government land upon which he sought to perfect a homestead entry. Under the theories advanced by the respective parties, the location of the line as it was run upon the ground in 1871 became important, and was necessarily decisive of the action. If plaintiff had described the several lots by metes and bounds in such a manner as to make Wild Horse Creek the southern boundary thereof, the evidence of the trespass would not be confined to the particular lots mentioned in the complaint, but might apply to any part of the land included within such boundaries. *Poor v. Gibson*, 32 N. H. 415. But, inasmuch as the premises are described as lots, the court properly gave the jury the following instruction: "Before you can find for the plaintiff, you must find that the trespass was committed and the injury done to the lots described in plaintiff's complaint, or upon some one of them. If you find the injury was done or the trespass committed upon lots or lands other than those described in the complaint, though the plaintiff may have been in possession of such other lots or lands, yet plaintiff cannot recover under the allegations of the complaint." An action of trespass for injury to real property is properly brought to recover damages arising from a deprivation of the possession thereof, in which case the title thereto is not an import-

ant factor, and becomes of consequence only as it serves to create the presumption that the owner of real property is entitled to the possession. Tested by this rule, the statement in the complaint that plaintiff had been in possession of said lots, of which he had been deprived by defendant, was a material averment, and the evidence necessary to sustain it should show that the trespass complained of was committed upon the premises described in the pleading.

As tending to support defendant's theory of the southern boundary of said lots, his counsel requested the court to give, among others, the following instructions to the jury, which it refused, towit: "I instruct you further that if you find from the evidence offered in this case that there existed at the time of the government survey and plat of the meander line of the reservation a quantity of upland between the meander line and the channel of Wild Horse Creek, covered with a natural growth of vegetation, and such tract of land was equal to or greater in area than the adjacent lots lying north of the meander line and claimed by plaintiff, then you may consider this fact as a circumstance tending to show that the meander line was intended as the south boundary of the lots claimed by plaintiff, regardless of the location of the creek. I instruct you that a meander line is a line run by the surveyor for the purpose of determining the sinuosity of the stream and the area of the lots, and where such line in fact meanders the stream, under the laws of this state the boundary of the lots described would be the center of the channel of the stream, and not the meander line as run on the shore. If, however, you find from the evidence in this case that there is a wide and material divergence between the meander line as run by the surveyor and the north bank of the stream, as it existed at the time of the survey, then I instruct you, as a

matter of law, that the meander line as run by the surveyor upon the ground, and not the stream, should be taken as the southern boundary of the lots described in plaintiff's complaint."

In making the original survey of public land bordering upon arms of the sea, lakes, and navigable rivers, the surveyor is required to run meander lines for the purpose of fixing the general average of the sinuosities of the shores or banks of such bodies or streams of water as a means of ascertaining the area of each tract the contour of which is rendered irregular by such obstacles, and from the field notes of the survey an official plat is prepared, which, when approved by the surveyor-general, usually represents the meander line as the border of the water, and demonstrates that the water course or body of water, and not the meander line as actually run on the land, constitutes the boundary thereof: *Railroad Co. v. Schurmeir*, 74 U. S. (7 Wall. 272); *Hardin v. Jordan*, 140 U. S. 406 (11 Sup. Ct. 808-838). But when, for any reason, the surveyor omits to include large tracts of land lying between the meander line as surveyed or as pretended to have been run upon the ground and such streams or bodies of water, the patents for the lots, though referring to the official plat of such survey for identification, are not equivalent to a conveyance of the premises to such navigable stream, lake, or bay, but are grants limited by such meander line: *Fulton v. Frandolig*, 63 Tex. 330; *Granger v. Swart*, 1 Woolw. 88, 90 (Fed. Cas. No. 5,685); *Lammers v. Nissen*, 4 Neb. 245; *Bissell v. Fletcher*, 19 Neb. 725 (28 N. W. 303); *Glenn v. Jeffrey*, 75 Iowa, 20 (39 N. W. 160); *James v. Howell*, 41 Ohio St. 696; *Shoemaker v. Hatch*, 13 Nev. 261; *Martin v. Carlin*, 19 Wis. 454 (88 Am. Dec. 696); *Fuller v. Shedd*, 161 Ill. 462 (52 Am. St. Rep. 380, 33 L. R. A. 146, 44 N. E. 286); *Ayers v. Watson*, 137 U. S. 584 (11 Sup. Ct. 201).

Tested by this exception to the general rule applicable to the survey of public land, we think defendant was entitled to an instruction illustrative of his theory of the case, and, this being so, inasmuch as the court did not embrace the subject in its general charge, it erred in refusing to give the first instruction requested.

Plaintiff contended that, inasmuch as the channel of Wild Horse Creek formed the boundary of the Indian reservation, the survey of the latter in 1871 must be regarded as the meander of said creek, and, this being so, that stream forms the south boundary of his land ; while defendant maintains that the boundary line of the reservation was located on the ground at such an unreasonable distance from the creek as to show that said boundary, and not the creek, formed the south boundary of the lots described in the complaint. The person who, in 1871, surveyed the boundary of the reservation, was a deputy surveyor-general, and, being a public officer, it will, under the presumption that official duty has been regularly performed, be presumed that the line so run by him was the meander of Wild Horse Creek ; but such presumption is disputable, and defendant, having introduced testimony tending to show that such boundary line was located from about one-fourth to one-third of a mile from the creek, was entitled to an instruction upon the effect of such survey, if the jury found that it had been so made. The boundary of an Indian reservation is treated as an obstacle to the survey of public lands by legal subdivisions. Rev. St. § 2395. True, the second instruction requested seems to treat such boundary as a non-navigable river, but when it is remembered that the boundary was indicated as "the bed of a dry creek" we think the proposed instruction contains, in the main, such a statement of the law applicable to defendant's theory of the boundary line of said lots as should have

been given to the jury, and, failing in this respect, the court erred. If the evidence had shown that Wild Horse Creek was a stream of any importance, the name and location of which were indicated on the official plat, from which it appeared that the lots in question bordered thereon, decisions may be produced which would authorize the jury to have found the creek boundary to be where the plat of the survey located it. *Bates v. Railroad Co.*, 1 Black 204; *Schurmeier v. St. Paul Railroad Co.*, 10 Minn. 82 (88 Am. Dec. 59). The field notes of the survey of 1871 do not purport to be a meander of Wild Horse Creek, nor does the amended plat contain the name of that stream, and, as the original field notes showed "the bed of a dry creek" at the section lines crossed by Wild Horse Creek, it may be that the surveyor erred in locating the boundary of the Indian reservation, in view of which the instruction requested became important; and hence it follows that the judgment is reversed, and a new trial ordered.

REVERSED.

Decided at PENDLETON, 13 August; rehearing denied 17 October, 1886.

LIEUALLEN v. MOSGROVE.

[54 Pac. 200]

NEGLIGENCE—CONSTRUCTION OF PLEADINGS.—A complaint alleging that defendants operated an engine on premises adjoining plaintiffs; that in so operating it they negligently took the fire from it and placed the same on the ground in the straw and stubble, and thereby, through negligence, permitted the fire so taken from the engine to spread and burn over said straw and stubble, and into plaintiff's field, and thereby, through defendant's negligence, the fire destroyed property on plaintiff's premises, charges only negligence in putting the fire in an improper place, and not negligence in failing to extinguish it after it has been taken from the engine.

ALLEGATA ET PROBATA.—An allegation that fire was negligently taken from defendant's engine used for threshing and placed upon the ground in and about the stubble, from which it communicated to and consumed plaintiff's property is not sustained by evidence that defendants were negligent in not properly extinguishing the fire after it had been properly taken from the engine. *Woodward v. Or. Ry. & Nav. Co.*, 18 Or. 280, and *Knahtla v. Or. Short Line Ry. Co.*, 21 Or. 130, applied. WOLVERTON, J., dissents.

88	282
86	518

83	282
37	448
37	450
38	354

38	282
40	132

33	282
46	178a

REMANDING CAUSE—LEAVE TO ANSWER.—Upon the remandment of a cause by the appellate court for further proceedings in the court below it is for the latter to determine in the first instance whether a party shall be given leave to plead over. *Powell v. Dayton, etc.*, R. R. Co., 14 Or. 22, and *State ex rel. v. Metchan*, 32 Or. 372, followed.

From Umatilla: STEPHEN A. LOWELL, Judge.

This is an action to recover damages for the destruction by fire of certain personal property belonging to the plaintiff, alleged to have been caused by the negligence of the defendants. The facts are that during the harvest season of 1897 defendants were engaged in operating a threshing machine in Umatilla County, the motive power of which was a steam, straw-burning engine commonly used for such purpose. This engine was so constructed that the only way of removing ashes or cinders therefrom was by means of a trapdoor in the bottom of the ashpan, which was swung on a rod through the center, so that by tipping it the ashes would drop to the ground. It was customary to wet the ground with a hose attached to the engine before and after the ashes had been dumped, in order to prevent danger from fire. In the course of a day it was necessary to thus remove the ashes several times, the amount varying from a very small quantity to a bucketfull, and the frequency according to the quantity of grain threshed at each setting. Water for use in the engine and for other purposes in and about the operation of the machinery was hauled in a large tank, which usually stood near the back part of the engine, where the straw was fed into it. On Saturday, August 7th, the defendants were threshing in the field of one Bergmann, and about 1 o'clock in the afternoon moved from one setting to another. Before doing so, the engineer and fireman dumped the ashes from the engine on the ground in the customary manner, wetting them down with the hose, and after the engine had been removed, William Mos-

grove, who was in charge of the grain for Bergmann, and also foreman of the threshing outfit, again wet down the ashes with a hose attached to the water tank, which was still in position. The day was calm, hot and sultry until about sundown, or a little after, when the wind arose, and between 9 and 10 o'clock that night increased to quite a gale, and caused the fire, which seems to have remained in the ashes, to communicate to the stubble and inflammable material, and sweep over the Bergmann field into the adjoining field of plaintiff, and burn up and destroy a large quantity of wheat, straw, and stubble pasture belonging to him; and this action is brought to recover the value of the property thus destroyed.

The complaint, after alleging the ownership and value of the property, avers that on or about the 7th day of August, 1897, the defendants entered upon the land lying immediately south of and adjacent to the lands of the plaintiff, "with an engine known as a 'Stillwater Minnesota Engine,' which said engine was thereupon operated by these said defendants, their agents and servants, by means of fire; and that these defendants, their agents and servants, in so operating such engine with fire, carelessly, negligently, and without due or proper regard or caution for the safety of the premises upon which they were located, and without due regard or caution for the safety of the personal property of this plaintiff, located on the lands adjacent thereto, did take and allow and permit the fire to be taken from said engine, and placed upon the grounds in and about the straw and stubble, * * * and thereby, through wanton carelessness and negligence, and without due caution, allowed and permitted the fire so taken from said engine to spread and burn over and through the stubble and straw upon said last-named premises, and into the field of this plaintiff, upon which the aforesaid personal property was located,

and thereby, through the negligence and carelessness and want of caution on the part of the defendants, their agents and servants, the said fire did, on or about the said 7th day of August, 1897, destroy, consume, and burn up the personal property of plaintiff as aforesaid, to plaintiff's injury and damage in the sum of \$3,842.60." The answer denied the negligence charged in the complaint, and upon the issue thus joined the cause was tried before a jury, and resulted in a verdict and judgment in favor of plaintiff, and defendants appeal.

REVERSED.

For appellants there was a brief over the name of *Bal-leray & Hailey*, with an oral argument by *Mr. Thos. G. Hailey*.

For respondent there was a brief over the names of *Carter & Raley* and *Stillman & Pierce*, with an oral argument by *Messrs. A. D. Stillman* and *J. H. Raley*.

MR. JUSTICE BEAN, after making the foregoing statement of the facts, delivered the opinion of the court.

The notice of appeal contains several assignments of error, but they present practically only two questions: First, error of the court in overruling defendants' motion for nonsuit, made at the close of plaintiff's testimony; and, second, error of the court in ruling and instructing the jury, in substance, that the plaintiff was entitled to recover in this action if it appeared that the fire which consumed his property was the result of the carelessness and negligence of the defendants in not caring for and extinguishing the fire contained in the ashes taken from the engine, although they were not negligent or careless in taking the ashes from the engine, and placing them upon the ground in and about the straw and stubble.

These two alleged errors involve practically the same point, for there seems to have been no proof of negligence in the operation of the engine. The ashes were taken therefrom in the ordinary and customary way, and the evidence shows that due care was exercised in doing so. The ground was first wet down, and the ashes, after they were dumped, were wet with the hose, both before and after the removal of the engine. It is true there was evidence tending to show that some fire was left in the ashes, unextinguished, which was uncovered by the wind storm, and probably communicated to the adjoining straw and stubble, and thus spread into the plaintiff's field, and consumed his property; but that fact is not evidence of negligence in taking the ashes from the engine, and placing them upon the ground at an unsuitable place, although it might be evidence tending to show that proper effort had not been made to extinguish the fire therein before leaving the field. The negligence of the defendants, if any, consisted in the fact that they did not use due care and caution in the attempt to extinguish the fire taken from the engine and dumped on the ground, and both the motion for a nonsuit and the instructions of the court involve the question as to whether the complaint charges the defendants with negligence in this particular. It is settled law in this state, as well as elsewhere, that in an action of this character the plaintiff cannot allege negligence in one particular, and on the trial prove and recover upon another, but that, where the complaint specifies the particular act of negligence relied on, the trial must be had on the issue thus made. *Woodward v. Or. Ry. & Nav. Co.*, 18 Or. 289 (22 Pac. 1076); *Knahtla v. Or. Short Line Ry. Co.*, 21 Or. 136, 142 (27 Pac. 91). For a learned discussion of the "necessity of alleging what you intend to prove in negligence cases," in view of the adjudication, refer-

ence is made to an article by Mr. Seymour D. Thompson in 30 Am. Law Rev. 827.

Now, no negligence can be imputed to the defendants from the mere fact that ashes, which necessarily contained some fire, were taken from the engine and placed upon the ground. They were engaged in a lawful business, and had a right to use fire in the operation of their engine, and to dump the ashes on the ground. Indeed, there was no other way of removing them, and hence no action lies for doing so, unless negligence appears either in dropping them at a place where the fire which might be contained therein would be likely to communicate to inflammable material, and thus spread over the adjoining field, or, after dropping them at a suitable and proper place, in failing to exercise due care and caution to extinguish the fire therein. If, on account of negligence in either of these particulars, the plaintiff's property was consumed, the defendants would be liable, but they are separate and distinct grounds of liability. The proof of one will not justify a recovery on a specified allegation of the other. Every person may lawfully set out fire on his own premises for the purposes of husbandry, or for any other lawful purpose, and he is not liable for an injury to his neighbor resulting therefrom unless he is guilty of negligence in setting out the fire at an improper or unsuitable time, or in not using reasonable care and diligence to prevent it spreading and doing injury to the property of others. *Hewey v. Nourse*, 54 Me. 256; *Higgins v. Dewey*, 107 Mass. 494 (9 Am. Rep. 63). But it has been held that an allegation that a defendant negligently and carelessly set fire to inflammable material on his own premises, which communicated to and consumed the property of the plaintiff, is insufficient to admit proof or sustain a recovery on the ground of negligence in allowing the fire to escape or

communicate to plaintiff's property. *Pittsburgh & St. Louis Railroad Co. v. Culver*, 60 Ind. 469; *Pittsburgh & St. Louis Railroad Co. v. Hixon*, 79 Ind. 111. So, in this case, an allegation that the defendants negligently and carelessly did take and permit the fire to be taken from the engine, and placed upon the ground in and about the straw and stubble, and thereby allowed it to communicate to and consume the plaintiff's property, would be insufficient to justify a recovery on the sole ground that they were negligent in not extinguishing the fire after it had been taken from the engine.

The averments of the complaint are somewhat involved, and it is not entirely clear whether the pleader intended to confine the charge of negligence to the operation of the engine by taking and permitting the fire to be taken therefrom, and placed on the ground in and among inflammable material, and by that means allow and permit it to burn over the straw and stubble and into the field of the plaintiff, and consume and destroy the property described in the complaint, or whether he intended to charge both negligence in the operation of the engine in the particulars referred to and in failing to extinguish the fire after it had been taken from the engine. But it seems to us the better construction of the pleading is, and its averments, omitting all surplusage and unnecessary repetition, are, that the defendants, while operating an engine, did carelessly and negligently, and without due or proper regard or caution, take and permit the fire to be taken therefrom, and placed upon the ground in and about the straw and stubble, and thereby—that is, by that means, or in consequence of that—allowed and permitted such fire to spread and burn over and through the stubble and straw into the field of the plaintiff, and burn up his property. The allegation that the fire was negligently taken and permitted to be taken

from the engine, and placed upon the ground in and about the straw and stubble, is connected with the statement that the defendants allowed and permitted it to spread and burn over and through the stubble and straw and into the field of the plaintiff by the word "thereby," which, according to the definition given by the lexicographers, signifies "by that means," or "in consequence of that," and therefore the pleading should be read as if it alleged that by means of or in consequence of the negligence of the defendants in taking the fire from the engine and placing it upon the ground in and among the straw and stubble it was allowed and permitted to spread and burn over and through the field of Bergmann, and into the fields of the plaintiff, and consume and destroy his property. This construction gives to the language of the complaint its ordinary and generally accepted meaning, while, to adopt the construction contended for by the plaintiff, it would be necessary to reject as surplusage words which are material, and which perform an important office in construing the pleading.

If the complaint had alleged that the defendants negligently omitted to extinguish the fire, and by reason of such negligent omission it was communicated to the stubble, and carried or spread into the plaintiff's field, and destroyed his property, evidence that there was fire in the ashes some time after the defendants left the premises would perhaps have been sufficient to have carried the case to the jury; but the complaint does not charge the defendants with negligence in this particular, but in taking the fire from the engine, and placing it on the ground in and among inflammable material. In other words, the act of negligence charged is in placing the fire on the ground at an improper and unsuitable place, where it was likely to spread, and destroy the plaintiff's

property, and not in negligently omitting to extinguish it after being so placed. In short, the allegations of the complaint are of positive acts of commission, and not of omission. Nor, as a matter of fact, is there any allegation that the defendants permitted or allowed the fire to spread, except as a result of the negligent act of placing it on the ground in and among the straw and stubble. The gist of the negligence charged in the pleading is in placing ashes containing fire in and among inflammable material, and the spread of the fire is averred as a consequence of such primary negligent act. It follows from these views that the court was in error in holding that the plaintiff could recover under the allegations of the complaint if the defendants were negligent in not extinguishing the fire before leaving the field, although they may not have been negligent in the operation of the engine, or in depositing the ashes on the ground at an unsuitable place. The judgment is therefore reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

WOLVERTON, J. I am constrained to dissent from the conclusion of my associates herein, as I am strongly impressed that by reasonable intendment and construction the complaint states a cause of action for negligently and without due caution allowing and permitting the fire to spread and escape, as well as in carelessly and negligently taking it from the engine, and placing it upon the ground in and about the straw and stubble in the first instance. Such a construction would affirm the judgment.

ON PETITION FOR REHEARING.

MR. JUSTICE BEAN delivered the opinion.

It is now insisted that the court was in error in assuming that there was no evidence of negligence in the operation of the engine, although at the hearing such was practically conceded to be the fact. The only question in the case was, whether the complaint charged negligence in not exercising due care and caution in caring for the fire after it had been taken from the engine and placed upon the ground, so that whatever was said in the opinion about negligence in the operation of the engine was in accordance with the theory upon which the case was submitted, and, if a mistake, could not in any way affect the result. Counsel in their petition for a rehearing expressly agree with the court in its construction of the complaint, and, this being so, it necessarily follows that the judgment of reversal must stand, because the plaintiff was permitted to recover upon a ground of liability not alleged.

It is also requested that the cause be remanded with permission to the plaintiff to amend his complaint. The practice in such cases, when a cause is remanded, as in this case, "for such further proceedings as may be proper not inconsistent with the opinion," is indicated in *Powell v. Dayton etc. R. R. Co.*, 14 Or. 22 (12 Pac. 83), and *State ex rel. v. Metschan*, 32 Or. 372 (53 Pac. 1071).

REHEARING DENIED.

Decided at PENDLETON, 13 August, 1898.

KIMBALL v. REDFIELD.

[54 Pac. 216]

NATURE OF CLAIM AND DELIVERY ACTION.—The common law action of replevin is reproduced in the statutes of Oregon without material change in form under the name of claim and delivery: *Moser v. Jenkins*, 5 Or. 448, *Sturles v. Sweeney*, 11 Or. 21, *Guille v. Wong Fook*, 13 Or. 577, followed.

REPLEVIN—NECESSARY ALLEGATION OF COMPLAINT.—A complaint in an action of claim and delivery must show that plaintiff was entitled to the possession of the chattels when the action was commenced.

IDEM.—An allegation in a replevin complaint that at a certain time before the commencement of the action plaintiff was the owner and entitled to the immediate possession of the property in question, and that defendant "still unlawfully and wrongfully retains the possession thereof" does not show that plaintiff was entitled to the immediate possession when the action was commenced.

APPEAL—DEFECTIVE PLEADINGS.—A plaintiff whose complaint would not support a judgment for him, and the defect in which has not been waived or cured by other pleadings or by verdict, cannot complain of errors at the trial: *Minter v. Durham*, 13 Or. 471, cited and explained.

"OWNER" IN REPLEVIN ACTIONS.—The term "owner" as used in replevin statutes and pleadings means one who has a right to the present possession of the property involved.

From Umatilla: STEPHEN A. LOWELL, Judge.

This is an action by the W. W. Kimball Company, a corporation, against C. E. Redfield, to recover the possession of a piano. The complaint was filed December 29, 1896, and in it plaintiff alleges, *inter alia*, in substance: That July 11, 1896, and for a long time prior thereto, it was the owner and entitled to the possession of a certain Hallet & Davis piano, style 21, No. 41,496, then in Umatilla County; that prior to the said July 11, 1896, and while the said piano was the property of plaintiff, the defendant took possession thereof, in said county; that June 11 and December 28, 1896, plaintiff demanded of defendant possession of said piano, but that he refused, and still refuses, to comply with such demands, or either of them, and that ever since July 11,

1896, it has been in defendant's possession, in said county and state; that said piano is of the value of \$300, and that the defendant still unlawfully and wrongfully retains possession thereof, within said county and state, to the damage of plaintiff in the sum of \$50. Upon filing the complaint, the plaintiff caused the said instrument to be seized and delivered to it. The defendant, after denying the material allegations of the complaint, alleges, in substance, that on August 28, 1893, plaintiff delivered to one D. W. Bailey the piano in question, upon a written lease thereof for twenty-one months, at the rental of \$354.85 for the term, which sum was evidenced by Bailey's eight promissory notes, with interest at 8 per cent. per annum from that date; that said lease provided that, if Bailey chose to purchase the piano during the time, he might do so by paying all said notes then unpaid, with interest to the date of such purchase; that about September, 1894, Bailey, in consideration of \$300, sold and delivered said piano to defendant, who ever since has been, and now is, the owner and entitled to the possession thereof; that plaintiff extended the payment of Bailey's notes from time to time, and that July 18, 1896, all of them had been fully discharged, except the sum of \$44.25, the payment of which had been extended to that time; that defendant tendered said sum to plaintiff on said day, and again December 28, 1896, Bailey's contract being still in full force, but it refused to accept the same, whereupon he brings this sum into court, in full satisfaction of the amount due on said notes. The reply having put in issue the allegations of new matter contained in the answer, a trial was had, resulting in a verdict and judgment to the effect that defendant was the owner and entitled to the possession of the property in controversy, but, if a return thereof could not be had, that he recover the sum of \$300, as its

value, from which judgment plaintiff appeals, assigning as error the action of the trial court in admitting testimony over its objection, giving instructions excepted to, and refusing to give other instructions asked by it.

AFFIRMED.

For appellant there was a brief over the names of *John J. Balleray* and *Marion A. Butler*, with an oral argument by *Mr. Balleray*.

For respondent there was a brief over the names of *C. E. Redfield* and *Chas. H. Carter*, with an oral argument by *Mr. Carter*.

MR. CHIEF JUSTICE MOORE, after making the foregoing statement, delivered the opinion.

It is contended by defendant's counsel that the complaint does not state facts sufficient to constitute a cause of action, for which reason it would not support a judgment, and hence it cannot complain of the errors assigned. The particular point insisted upon is that the complaint failed to allege that, at the time the action was commenced, plaintiff was entitled to the immediate possession of the property sought to be recovered. The common-law action of replevin has been abolished in this state, and a new remedy substituted therefor, which is known as "claim and delivery," but no material changes in the old form of action have been inaugurated by the more recent procedure. Hill's Ann. Laws, § 132 *et seq.*; *Moser v. Jenkins*, 5 Or. 447; *Surles v. Sweeney*, 11 Or. 21, (4 Pac. 469); *Guille v. Wong Fook*, 13 Or. 577, (11 Pac. 277). It has been repeatedly held, in replevin, that the right to the immediate possession of the chattels in controversy, at the time of bringing the action,

is essential to the recovery, and that such right, to be available, must continue in full force until the judgment is obtained *in rem* for such property, or *in personam* for its value and damages for its detention. Wells, Repl. § 94; Cobbey, Repl. § 94; 20 Am. & Eng. Enc. Law, (1st ed.) 1046; *Britt v. Aylett*, 52 Am. Dec. 282; *Collins v. Evans*, 15 Pick. 63; *Dodworth v. Jones*, 4 Duer, 201; *Wyman v. Dorr*, 3 Greenl. 183; *Ingraham v. Martin*, 15 Me. 373; *Noble v. Epperly*, 6 Ind. 414; *Frizell v. White*, 27 Miss. 198; *Cassel v. Western Stage Co.*, 12 Iowa, 47; *Campbell v. Williams*, 39 Iowa, 646; *Marshall v. Bunker*, 40 Iowa, 121; *Peterson v. Lodwick*, 44 Neb. 771, (62 N. W. 1100); *Campbell v. Quinton*, 4 Kan. App. 317, (45 Pac. 914).

In *Affierbach v. McGovern*, 79 Cal. 268, (21 Pac. 837), an action was commenced December 15, 1884, to recover certain personal property, the complaint averring that plaintiff was the owner and entitled to the possession thereof August 12, 1880. No demurrer to this pleading was interposed, and, a trial being had, resulted in a judgment for plaintiff; whereupon the defendant appealed, contending that the complaint did not state facts sufficient to constitute a cause of action. In reversing the judgment, Mr. Justice WORKS, speaking for the court, says: "A complaint, to be good, must show a cause of action in favor of the plaintiff, and against the defendant, existing at the time the action is commenced. This complaint does not show this, but, if it states a cause of action at all, shows that it existed more than four years before the commencement of the suit, and for that reason the complaint is clearly bad." In *Fredricks v. Tracy*, 98 Cal. 658, (33 Pac. 750), an action was commenced November 19, 1890, to recover certain goods and chattels, plaintiff alleging that November 17, 1890, he was the owner and entitled to the immediate possession

of the property sought to be recovered, and that on the latter date he demanded of defendant possession of said goods and chattels, but that the latter refused to deliver the same, and unlawfully withheld possession thereof. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, having been overruled, one of the defendants thereupon answered, averring that November 18, 1890, he purchased the property in question from his co-defendant. Judgment for plaintiff having been rendered, the court, in reviewing it, say : " To sustain this action, plaintiff must have the right to immediate and exclusive possession at the time of the commencement of his suit. It is a cardinal principle in pleading that ultimate, and not probative, facts are to be pleaded. The ultimate fact in such an action is that plaintiff was at the time the action was commenced the owner of, or had some special property in, the chattel, coupled with a right to the immediate possession thereof. The fact that he was the owner and entitled to the possession at a previous date is evidence from which the ultimate fact may be deduced, upon the principle that ' a thing once proved to exist continues as long as is usual with things of that nature ' : Code Civ. Proc. § 1963, subd. 32. This principle, however, has no application to the statement of facts in a pleading : *Alden v. Carver*, 13 Iowa 253, (81 Am. Dec. 430). "

In *Holly v. Heiskell*, 112 Cal. 174 (44 Pac. 466), judgment in an action of replevin having been rendered against defendant, he appealed, contending that there was no averment in the complaint that plaintiff was the owner or entitled to the possession of the property in question at the time the action was instituted. In reversing the judgment, Mr. Justice McFARLAND says : " In a suit to recover personal property, the complaint must show the ultimate fact that plaintiff was the owner or entitled to

possession at the time of the commencement of the action; and it is not sufficient to merely aver that he was the owner or entitled to possession at some period prior to that time." In the case at bar the allegation that July 11, 1896, plaintiff was the owner and entitled to the immediate possession of the piano is not an averment that such right of possession existed December 29th of that year. Nor does the allegation that defendant "still unlawfully and wrongfully retains the possession of said piano" cure the infirmity in the pleading, for this averment is the mere statement of a conclusion of law, without any recital of facts upon which to predicate the assertion. In *Scofield v. Whitelegge*, 49 N. Y. 259, Mr. Justice FOLGER, discussing the effect of a similar allegation, says: "The plaintiff here alleges that the defendant wrongfully detains from him the chattel in question. If, indeed, that be true, then it must be that the plaintiff has a general or special property in the chattel, and the right of immediate possession, but unless he has that general or special property and right of immediate possession, it cannot be true that it is wrongfully detained from him. The last, the wrongful detention, grows from the first, the property and the right of possession. The last is the conclusion. The first is the fact upon which that conclusion is based. It is the fact which in pleading must be alleged." It is evident from these decisions that the complaint is defective; and, such being the case, it remains to be seen whether the imperfection in the pleading would have rendered a judgment based thereon ineffectual had a verdict been returned in plaintiff's favor, and, if so, does such defect preclude plaintiff from insisting that the court erred at the trial of the cause?

"The question," says Mr. Justice THAYER in *Minter v. Durham*, 13 Or. 470 (11 Pac. 231), "has often arisen in this court whether an appellant had a right to com-

plain on account of an error committed against him in the trial court when his own pleading was faulty. It has always seemed to me in such cases that the rule should be this: If the party complaining would not, in consequence of the defectiveness of his pleading, be entitled to judgment, he ought not to be heard to complain of the error, as it could not have injured him. If a plaintiff omits from his complaint a material allegation, he would not be injured by an error committed during the course of trial of the action, as he would not have been entitled to judgment in any event; but where the objection to the pleading has been waived by answering it, or where the defect would be cured by a verdict, the party is entitled to be relieved against an error committed at the trial prejudicial to his case." Defendant relies upon the language just quoted to sustain the judgment he has obtained, and, if the exceptions there noted sufficiently qualify the rule announced, it must be admitted that it is decisive of the case at bar. No verdict having been returned for plaintiff, it is unnecessary to consider what effect such a verdict might have had in aid of the pleading, except to say that, while a verdict may cure a defective informal statement, it can never supply a material averment going to the gist of the action. *Houghton v. Beck*, 9 Or. 325; *David v. Waters*, 11 Or. 448 (5 Pac. 748); *Weiner v. Lee Shing*, 12 Or. 276 (7 Pac. 111); *Bingham v. Kern*, 18 Or. 199 (23 Pac. 182); *Booth v. Moody*, 30 Or. 222 (46 Pac. 884).

If the language, "where the objection to a pleading has been waived by answering it," as used by Mr. Justice THAYER, means that a plaintiff, in case his complaint does not state facts sufficient to constitute a cause of action, may nevertheless appeal from a judgment rendered against him upon a demand by defendant for affirmative relief, or from a judgment which would pre-

clude him from maintaining a right which he asserted prior to the trial of such action, then the rule announced by the learned justice is undoubtedly proper; but if it is susceptible to the construction claimed for it, viz., that a judgment rendered on a counterclaim interposed to a defective complaint is a bar to the maintenance of an appeal by plaintiff, and would preclude him from having the errors alleged to have been committed by a trial court reviewed, the rule thus laid down is not founded in reason, and can never become of universal application; for, if it were to prevail, it would be a deprivation of a right conferred by statute. The only legal conclusion deducible from the conditions referred to is a judgment of nonsuit, which, when rendered, affords the relief which the law awards; and plaintiff, having obtained the full measure of his right when the nonsuit is given, ought not to be heard to complain of errors of the trial court which could not possibly affect him injuriously under such circumstances. An answer which will waive the objection to a defective complaint, thereby rendering the errors reviewable on appeal, must supply the material allegation omitted from the complaint, or contain an averment of such material facts as entitles defendant to the affirmative relief afforded by the judgment.

It will be remembered that the answer alleges that defendant is the owner and entitled to the immediate possession of said piano; but this averment does not mean, in actions for the recovery of personal property, a right of property in the chattel, but means such an interest therein as entitles the pleader to an immediate right of possession. "The term 'owner,' as used in the replevin statutes," says Mr. Cobbey in his work on Replevin (section 533), "does not mean absolute and unqualified title, but means a right to possession. Any interest coupled with a right of immediate possession constitutes

ownership under these statutes." This being so, the answer did not supply a material averment omitted from the complaint. True, it is adjudged that defendant is the owner of the piano; but this judgment is not necessarily binding upon the parties, for in an action of this character the right to the immediate possession constitutes the issue to be tried, and hence the title to the chattel is not involved, nor even considered, except in so far as it may tend to show that the owner of such property is presumptively entitled to the possession thereof. In *Chadwick v. Miller*, 6 Iowa, 35, the plaintiff having taken a voluntary nonsuit, it was adjudged that the defendant was the owner of the property replevied; but the court, commenting on the effect of the judgment, in affirming it, say: "The record entry of the finding of the court that the right of property was in the defendant has no weight in the determination of the question before us, for that, being unnecessary and unauthorized, has no legal force."

The pleadings show that, at the commencement of the action, plaintiff, by its agent, the sheriff of Umatilla County, obtained possession of the piano, which it held at the time of the trial. Its failure to allege a right to the immediate possession of the chattel sought to be recovered rendered a judgment of nonsuit the relief to which it was entitled; and, as the plaintiff in replevin must recover on the strength of his right to the immediate possession of the property which is the subject of the action, the rule is that, if he takes a judgment of nonsuit, the defendant is entitled to the same judgment and damages as if he had recovered a verdict against the plaintiff. *Kerley v. Hume*, 3 T. B. Mon. 181; *Smith v. Winston*, 10 Mo. 190; *Chadwick v. Miller*, 6 Iowa, 35. The adjudication in the case at bar being tantamount to a judgment of nonsuit, because the complaint does not

state facts sufficient to constitute a cause of action, and this infirmity in the pleading never having been waived (Hill's Ann. Laws § 71; *Evarts v. Steger*, 5 Or. 147; *Ball v. Doud*, 26 Or. 14 (37 Pac. 70)), it follows that the judgment is affirmed.

AFFIRMED.

Decided at PENDLETON, 13 August, 1898.

HARGETT v. BEARDSLEY.

[54 Pac. 208]

1. PLEADING.—Under the rule here established that an objection to a complaint because it does not state a cause of action is never waived, it is immaterial whether a court erred or was correct in overruling a motion for judgment *non obstante* after disposing of a demurrer which raised the same point.
2. CONSTRUCTION OF CONTRACT—LEASE.—A contract by which one person is to rent certain premises, advance and pay the rent therefor, furnish necessary grain to seed the same, advance the money for harvesting the crops and the sacks for the same, and a second person is to cultivate the land and care for the crop produced until ready for harvesting, furnish the necessary assistance in harvesting, and out of the proceeds arising therefrom repay the former all money advanced for harvesting, sacking and marketing the crop and for rent of the premises, and also a debt due from him to such former person, entitles the husbandman to any surplus remaining after making such payments, although the contract is silent in regard thereto. Considered in its entirety the contract is one of leasing.
3. TENANCY IN COMMON.—A tenancy in common between the landlord and tenant in the crop produced by the latter is never created where there is a cash rental.

From Umatilla: STEPHEN A. LOWELL, Judge.

Action by J. D. Hargett against James S. Beardsley.
Judgment for plaintiff. Defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Carter & Raley* and *Stillman & Pierce*, with an oral argument by *Mr. A. D. Stillman*.

For respondent there was a brief over the name of *Bal-leray & Hailey*, with an oral argument by *Mr. Thos. G. Hailey*.

86	301
40	33
40	558

88	301
41	51
41	298

MR. JUSTICE WOLVERTON delivered the opinion.

This is an action for money had and received, and the complaint alleges, in substance, that about February 15, 1896, the plaintiff was indebted to defendant in the sum of \$1,500, for which he had given his promissory note and a mortgage to secure the same, and, being so indebted, plaintiff and defendant entered into a contract whereby defendant undertook and agreed to rent certain premises of a third party, consisting of 370 acres, advance and pay the rent therefor, furnish the necessary grain to seed the same, advance the necessary money for harvesting the crop and furnish the necessary sacks for sacking the same, and the plaintiff undertook and agreed upon his part to plow and summer-fallow the land during the spring and summer of 1896, and in the fall of the same year to sow the same to wheat, with the seed furnished by defendant, in a good and husbandlike manner, cultivate and care for the crop produced until ready for harvesting, furnish the necessary assistance in harvesting the same, and out of the proceeds arising therefrom repay to the defendant all moneys advanced by him for seed, harvesting, sacking, and hauling the crop to market, together with the amount advanced for rent of the premises, and also pay out of such proceeds, if there should be sufficient for the purpose, the sum of \$1,500 due as aforesaid from the plaintiff to defendant. Then follow allegations touching the leasing of the premises by defendant in compliance with the contract; the plowing, summer-fallowing, sowing and harvesting upon the part of plaintiff; and the further fulfillment of the terms and stipulations of the agreement as it regards both parties; and the amount of wheat produced and harvested. The complaint further avers that about September 1, 1897, the defendant, with the consent of plaintiff, and as his

agent, sold and disposed of the wheat thus produced for the sum of \$8,604.72, and was authorized by plaintiff to deduct therefrom the aggregate sum of \$2,430 due him for moneys advanced for rent of land, harvesting expenses, sacks, hauling, etc., and the further sum of \$1,522.50, the amount then due upon said promissory note, and that there remained after such deductions the sum of \$4,252.22, which the defendant had and received to and for the use and benefit of the plaintiff. A demurrer was interposed to the complaint, and overruled by consent of the parties. At the trial objections were made and overruled to the introduction of plaintiff's evidence upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and after a verdict for plaintiff the defendant moved for judgment *non obstante*, based upon the same ground, which was also overruled; and the action of the court in so disposing of the objections and motion constitutes the principal assignments of error.

1. It has been suggested that a demurrer to the sufficiency of the complaint having been overruled by consent of the parties precluded the defendant from raising the same question by motion for judgment *non obstante*. The statute gives the right to the defendant, when the complaint does not state a cause of action, to interpose such motion, but upon condition that the objection has not been taken by demurrer. Hill's Ann. Laws § 266. A similar rule prevailed at common law, which was that "after judgment upon demurrer there can be no motion in arrest of judgment for any exception that may have been taken on arguing the demurrer": *Order of Mutual Aid v. Paine*, 122 Ill. 625, 628, (14 N. E. 42); *American Express Co. v. Pinckney*, 29 Ill. 392; *Quincy Coal Co. v. Hood*, 77 Ill. 68. But this is perhaps more a matter of

technical practice than of substance, as the objection for the cause named is never waived, and may be urged for the first time in the appellate court: *Evarts v. Steger*, 5 Or. 147; *Booth v. Moody*, 30 Or. 222 (46 Pac. 884); *Wilson v. Myrick*, 26 Ill. 34. There is, however, reason for its support, in that, the court having once passed upon the identical question in disposing of the demurrer, it becomes the law of the case in the court below in the subsequent proceedings; and, while it could not be said that the court below erred in refusing to entertain a motion for judgment *non obstante* after it had passed adversely upon a demurrer going to the same question, yet, the record being before us upon appeal, we may inquire whether the complaint, so objected to at either stage of the proceedings, or here for the first time, is so defective as to render it insufficient to sustain the judgment: *Chicago & E. I. Railway Co. v. Hines*, 132 Ill. 161 (22 Am. St. Rep. 515, 23 N. E. 1021). In this view it becomes unnecessary to inquire what was the effect of overruling the demurrer by consent, or to consider the objections made to the introduction of evidence, and we will proceed at once to a consideration of the sufficiency of the complaint.

2. The pivotal contention of defendant is that, having himself leased the premises upon which the crop was produced, he stands in the situation of the owner of the soil, and, having furnished the seed for its production, that he became the owner of the crop, and hence that the proceeds thereof were his, and could not inure to the use or benefit of the plaintiff; in short, that the complaint does not show that plaintiff became the owner of the wheat, when produced, and that a receipt of its proceeds when marketed by the defendant was for his use. It requires an analysis of the complaint to determine whether

this position is tenable. As disclosed thereby, the defendant agreed to the following: First, to rent the premises, and to advance and pay the rental; second, to furnish the seed wheat; third, to advance the necessary money for harvesting the crop, and furnish sacks for sacking the same; while plaintiff agreed: First, to plow and summer-fallow the land, and seed the same with the seed furnished by the defendant; second, to care for the crop until ready for harvest, and furnish the necessary assistance in harvesting the same; and, third, to repay, out of the proceeds thereof, to defendant, (1) all moneys advanced by him for seeding said land, (2) all moneys for harvesting said crop, (3) all moneys for sacking and hauling the same, (4) all moneys advanced by him as rent for said land, and, (5) if sufficient remained, to repay the said sum of \$1,500 due defendant upon the said note. These comprise the mutual undertakings of the parties. A surplus was probably not in contemplation, but an unexpected yield produced it, and the controversy is concerning the ownership. There is no direct allegation that plaintiff was the owner of the crop, and the question is whether there is sufficient from which ownership might be inferred. The inducement for the contract was the indebtedness due from plaintiff to defendant. This, we think, is apparent. The defendant was to, and did, lease the premises; and this, of course, vested in him the legal title to the leasehold estate thus created; and, to strengthen the position, we may suppose that he was the absolute owner of the soil. Now, the ultimate stipulation touching the rental was that plaintiff shall pay it. The defendant was to pay the owner in the first instance, but plaintiff agreed to reimburse him for the outlay; so that in the end the burden was to fall upon the plaintiff. So it was with all advances made by defendant for seed,

expenses of harvesting, sacks, etc. He was to be reimbursed by the plaintiff to the uttermost farthing, and made absolutely whole for every outlay. The plaintiff was charged with the cultivation of the soil, seeding, caring for the crop, and furnishing assistance in harvesting the same. Here is a direct expenditure of labor, for which no remuneration is provided, unless it be assumed that he was producing his own crop.

Another significant feature of the transaction is that such reimbursement by the plaintiff was to be made out of the proceeds of the crop. An exaction of the undertaking to make implies a willingness to receive repayment of such proceeds at the hands of plaintiff, so that we do not have far to go to find an inference of ownership. It is bad logic to say that plaintiff will repay defendant for disbursements, and a debt for money loaned, out of the proceeds of defendant's own property. There could be no discharge of obligations by such method. True, the agreement contemplated the assumption of obligations on the part of plaintiff; but at the same time it provided for their discharge, as well as for a partial or total discharge of the primary obligation which formed the inducement for the mutual undertakings of the parties. The ultimate effect of the contract was a leasing of the premises by plaintiff from defendant as if he was the owner thereof, and a payment to him of the stipulated rental for its use; and the crop became the property of plaintiff, as if he had rented lands in the usual course, and paid a cash rent therefor. There is ample ground for an inference of ownership of the crop in the plaintiff. But this is not all. The complaint shows that the defendant came into possession of the grain sold with the consent and as the agent of plaintiff, and that he received the money as the proceeds of such sale to the use and benefit of plaintiff. If there is any

defect in the complaint, it is certainly cured by the verdict. The allegations are sufficiently general to comprehend ownership by plaintiff of the crop produced, and we must assume that evidence pertinent to the inquiry was given, sufficient to support the verdict returned in plaintiff's behalf: *Booth v. Moody*, 30 Or. 222 (46 Pac. 884); *Kean v. Mitchell*, 13 Mich. 206, 212.

3. Another question suggested was that the leasing was of joint concern, and that plaintiff and defendant became tenants in common of the crops produced. But under our interpretation of the contract that relationship could not exist. A cash rental can never produce a tenancy in common between the landlord and tenant in the crop produced by the tenant. The landlord receives his compensation, not in the product of the soil, but in money. The judgment of the court below must therefore be affirmed. The exceptions reserved to instructions are but another method of presenting the same questions, and need not be considered.

AFFIRMED.

Argued 23 December, 1897; decided 7 February, 1898.

PORTLAND v. BITUMINOUS PAVING CO.

[52 Pac. 28; — L. R. A. —]

MUNICIPAL CORPORATIONS—CONSTRUCTION OF CONTRACT.—Under an ordinance providing that a paving contractor shall give a bond to the city in an amount equal to the contract price of the improvement, conditioned that he shall perform the contract according to specifications, and also give a bond equal to 25 per cent. of the contract price, conditioned that for the period of five years from the date of its completion he will keep the pavement in repair by immediately, upon proper notice, repairing at his own cost and expense any injuries or worn-out places or other defects due to traffic, or on account of disintegration or decay, or in any manner attributable to defective materials or workmanship, a bond given by a contractor under the latter part of the ordinance is an undertaking to maintain the pavement in repair for a designated period of time, and not a guaranty that the work will be done and the materials furnished according to the contract.

PAVING CONTRACT—ULTRA VIRES.—Where a city is authorized to repair its streets, and, if so declared by ordinance, assess the cost against the adjacent

38	307
138	353
38	307
435	447
435	450

property, the repairs contemplated are those whose present necessity exists in the opinion of the council, and there cannot be inserted in a contract for street paving, to be paid for by special assessment, a provision requiring the contractor to keep the street in repair for a period of years.

STREET ASSESSMENTS—VALIDITY.—An assessment against property to meet expenses of street repairs required by an illegal contract is void.

POWER OF CITY TO ACCEPT BOND FOR MAINTENANCE OF STREETS.—A bond to a city by a street contractor which constitutes an independent undertaking by the latter to keep the street and pavement in repair for a given number of years, and which covers in effect all injuries liable to arise from whatsoever source, is not authorized by a statutory power to take security by bonds for the performance of contracts.

BOND FOUNDED ON ULTRA VIRES CONTRACT.—A bond given for the performance of a contract with a city is void and incapable of enforcement, where the contract is *ultra vires*, and would cause an illegal application of the city's funds.

ESTOPPEL.—A municipality will be estopped to enforce the performance of a contract under the same or like conditions that an individual will be estopped to proceed against it.

MUNICIPAL CORPORATIONS—VOLUNTARY BOND—ULTRA VIRES.—The fact that the bond is voluntary and founded upon a valid consideration will not enable a city to enforce a bond by a street contractor to repair a street for a period of years, when the contract is entirely beyond the general scope of the powers of the city, even if it has been fully executed by the city.

From Multnomah: HENRY E. MCGINN, Judge.

Action by the City of Portland against the Bituminous Paving & Contract Co. and others on a bond. The complaint, after setting forth the corporate character of the plaintiff and the defendant company, alleges, in substance, the following facts: That said paving and improvement company entered into a contract with the city, a copy of which is attached to the complaint, and marked "Exhibit A"; that on June 29 and 30, 1891, Ordinance No. 6,718, providing for the improvement of Washington street from the west line of Second street to its intersection with B street, was passed and approved. Section 3 treats of the general character of the work; section 4 provides that the grading, sidewalks, and gutters shall conform, as nearly as practicable, to the requirements of sections 6, 7, and 9 of Ordinance No. 2,839, and the paving, as nearly as practicable, to the

provisions of Ordinance No. 6,715, relating to the manner of laying bituminous rock pavement, except as provided in section 3; and section 5, that the provisions of section 11 of said Ordinance No. 2,839 shall apply to lumber and all other material used in the improvement. Section 30 of said Ordinance No. 6,715 provides as follows: "The contractor shall give a good and sufficient bond to the City of Portland in an amount equal to the contract price of said improvement, conditioned that he will commence and complete the proposed improvement according to the specifications herein mentioned, and that in addition to the foregoing, he will give a good and sufficient bond to the city of Portland, in amount equal to 25 per cent. of the contract price of said improvement, conditioned that for the period of five years from the date of its completion, he will keep the pavement in repair by immediately, upon proper notice, repairing at his own cost and expense any injuries or worn out places or other defects due to traffic, or on account of disintegration, or decay, or in any manner attributable to defective materials or workmanship. The sureties upon this bond shall justify to double the amount of such bond. Payment in full of the contract price shall not release the sureties until said period of five years shall have expired, said bonds to be approved as required by the city charter."

Pursuant to the terms of said contract and the provisions of the ordinance therein referred to, and in consideration thereof, the said paving and improvement company, as principal, and defendants A. N. King and D. P. Thompson as sureties, made, executed, and delivered their bond to the City of Portland, a copy of which is attached, marked "Exhibit B," and made a part of the complaint. The said company, pursuant to the terms of its agreement, completed said improvement on the 18th

day of November, 1891. It is alleged "that for a long time prior to the commencement of this action, and at the present time, the said pavement, within the limits of said improvement, was injured and defective, and has been, and now is, completely worn out, and the said pavement is full of deep and dangerous holes, and is almost impassable, all of which is due to traffic, disintegration, decay, defective material used in the construction thereof, and the workmanship of the same; that on or about the 10th day of September, 1894, and prior thereto, and before the commencement of this action, the said plaintiff duly notified the said Portland Bituminous Paving & Improvement Company of the condition of the said street as aforesaid, and duly requested the said company to repair the same, but the said defendant has failed and refused, and now fails and refuses, to repair the same, or any part thereof; that by reason of said failure and refusal of the said company to comply with the terms of said bond to keep the street in repair as aforesaid, the city is and will be compelled to repair the same, so as to make it safe and passable, and suitable for the travel over the same, and to expend large sums of money therefor; whereby the city is and has been damaged in the sum of \$9,000."

The terms of the contract, marked "Exhibit A," are that the paving and improvement company shall, among other things, furnish the material and perform the labor necessary or required under the provisions of Ordinance No. 6,718 for the improvement of said Washington street, and complete said improvement on or before November 6, 1891, to the satisfaction of the city council, and do and perform all of said work in a good and workmanlike manner, and according to the provisions and requirements of said ordinance and other ordinances and parts of ordinances therein referred to. The consideration to be paid for such improvement is specifically stated, but

it is further stipulated that the paving and improvement company shall be paid by warrants drawn upon a fund derived from local assessments upon the property adjoining and benefited, and it is expressly agreed that the said company shall look for payment only to such fund, and will not require the city to pay for the same out of any other fund by any process whatever. Exhibit B is in form a bond whereby the Portland Bituminous Paving & Improvement Company, as principal, and A. N. King and D. P. Thompson, as sureties, have bound themselves unto the City of Portland in the sum of \$9,000, conditioned as follows: "Now, if said contractor shall, for the period of five years next following the date of completion of the work of improvement hereinabove referred to, keep the said street and pavement in repair from the said west line of Second street to the intersection of Washington and B streets, in said city, by immediately, upon proper notice, repairing, at its own cost and expense, any injuries or worn-out places, or other defects due to traffic, or on account of disintegration or decay, or in any manner attributable to defective materials or workmanship, then this obligation to be void; otherwise to remain in full force and virtue." A demurrer to the complaint was overruled, and judgment entered for plaintiff after trial before the court.

REVERSED.

For appellants there was a brief over the names of *Julius C. Moreland* and *R. & E. B. Williams*, with an oral argument by *Messrs. Moreland and Richard Williams*.

For respondent there was a brief over the names of *Wm. M. Cake*, city attorney, and *Fred. L. Keenan*, with an oral argument by *Mr. Cake*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion.

It is important at the outset to ascertain and determine the proper interpretation to be given the language of the condition of the bond relating to repairs. The respondent contends that the condition is effective only as a guaranty that the work and materials will be done and furnished according to the stipulations of the contract, and hence that the bond stands as security for the faithful performance thereof. The language of the ordinance and the condition are very nearly identical, so that the consideration of the purpose of the former must necessarily aid us in arriving at the true construction of the latter. By the ordinance the contractor is required, in the first place, to give a good and sufficient bond, in amount equal to the contract price, conditioned, among other things, that he will commence and complete the proposed improvement according to the specifications. In addition to this, another bond, in a sum equal to 25 per cent. of the contract price, is required to be given, conditioned as is the one in suit. Now, the evident purpose of the common council in requiring the larger bond was to secure a faithful performance of the contract in all its details, as by its terms it is equivalent to a requirement that the improvement shall be completed according to specifications, and this, we assume, comprehends the quality of the materials stipulated for, as well as the manner of the workmanship. So there would appear to be no need of the lesser one, except to subserve some other purpose; and it is not reasonable to suppose that the two bonds were intended to afford to the city cumulative remedies for the accomplishment of one and the same end. The language and grammatical arrangement of the ordinance and condition are in harmony with this

thought. The obligation is to repair injuries arising from several causes, among which are such as may arise from defective materials and workmanship.

A guaranty against injuries for a reasonable time after completion, which may be attributable to these specific causes, might be regarded as a suitable, and perhaps proper, test of substantial compliance on the part of the contractor, and therefore might be held to operate as a guaranty of faithful performance, for it is sometimes argued that, if the work is well done, it would need no repairs within such time. Still it is not a felicitous way of stating the guaranty for sound and good work: *City of Covington v. Boyle*, 6 Bush, 204. However that may be, such could not be the purpose of the bond in suit, because the city took another looking to that end. The causes assigned are so broad and comprehensive in their scope as to include injuries arising from every substantial source, and, in effect, subjoins an independent condition, not covered by the contract. So that the undertaking is simply to keep and maintain the street and pavement in repair for a designated period of time, regardless of the quality of the material stipulated to be furnished or supplied, or the workmanship to be employed. Upon the other hand, it is urged that the bond is invalid, because it was given as a guaranty that the contractor shall make and keep up the repairs upon the street and pavement, the expenses for which the city has, without power or rightful authority, assessed against the adjoining property. The city is empowered by charter provisions to improve its streets and to assess the cost thereof against the adjacent property: Charter City of Portland, §§ 94, 100. It may also repair any street, or part thereof, whenever it deems it expedient, and assess the cost against such property; but before doing the same it must be declared by ordinance whether the cost

shall be so assessed or paid out of the general fund. When it is declared that the proposed repair shall be made at the cost of adjacent property, thereafter it is to be deemed an improvement, and shall be made accordingly : *Id.* §§ 122, 123. So that we find here authority to make both improvements and repairs and to assess the expense thereof against adjacent property. The manner of procedure in either instance is somewhat different, but the power remains. The repair contemplated, however, is such as the council may deem expedient to be made ; that is, the necessity therefor must exist by the consideration of that body. Like an improvement, the probable cost of making it must be ascertained and determined, and this forms the basis for the assessment. As it pertains both to the improvement and repair, the council is empowered to make provisions for present exigencies, and it may charge the expense thereof against the property supposed to be benefited. Beyond this it would appear that it is not authorized to act. We have not been referred to any provision in the charter authorizing it to make contracts for keeping or maintaining streets or highways, or any improvements thereon, made or to be made, in repair, or to levy the estimated cost of anticipated future repairs against property of individuals. It is manifest that the letting of the contract upon condition that the contractor should bind himself to keep up repairs for a period of five years, due generally to traffic, disintegration and decay, defective materials and workmanship, was calculated to increase the amount of the bid by the estimated cost of such repairs. At least, the condition imposed an additional burden, which would not be assumed or undertaken without compensation. And the contractor would very naturally be expected to demand a higher price, in consideration of the obligation to assume the additional burden. Thus, by exacting the

bond, a burden was undeniably imposed upon the adjacent property beyond such as was authorized by the charter. Such, in effect, is the holding of the court in *Brown v. Jenks*, 98 Cal. 10 (32 Pac. 701) wherein the court say: "This act contains no grant of authority to the city council for keeping a street in repair. Section 2 authorizes the council to contract for different kinds of street work. In all cases the work authorized is such as is necessary to make and complete a street, or to repair existing defects. The bond is not only unauthorized by the words of the statute, but the requirement changes, and may increase, the burdens of the property owner. It is manifest that the obligation to keep the street in repair for five years is a burden which one would not undertake for nothing. Therefore a contractor would charge a higher price for the work when he was forced to contract also for repairs. The expense undertaken is indefinite, and the property owner must pay for them in advance, whereas the statute provides for repairs after the necessity for them appears. Then, it being contingent, he will be paying for repairs which may never be required." In *People v. Maher*, 56 Hun, 81 (9 N. Y. Supp. 94), it appears that by provision of the charter of the City of Albany, N. Y., the expenses for ordinary repairs of a certain avenue to be paved with Trinidad asphalt were to be borne by the city. But the city council, in its ordinance providing for the pavement, required the contractor to agree "to keep said pavement in repair for seven years from and after its acceptance by the city, without expense to said city or abutting property owners," which provision was inserted in the specifications under which bids were received for the work, and pursuant to which the contract was made. It was held, on the question of its validity, that the necessary effect of the contract was to charge upon property owners the

cost of keeping the avenue in repair in violation of the charter regulations, and the contract was therefore adjudged to be illegal. To the same effect, see *Fehler v. Gosnell*, 99 Ky. 380 (35 S. W. 1125); *McAllister v. City of Tacoma*, 9 Wash. 272 (37 Pac. 447, 658); *Boyd v. City of Milwaukee*, 92 Wis. 456 (66 N. W. 603); *Verdin v. City of St. Louis* (Mo. Sup.) 27 S. W. 447; *Id.*, 131 Mo. 26 (33 S. W. 480, and 36 S. W. 52). *City of Schenectady v. Trustees of Union College*, 66 Hun, 179 (21 N. Y. Supp. 147) illustrates the distinction drawn by the authorities touching the effect of the condition. In that case the undertaking was to "do all the work required by such ordinance and this contract in such good and substantial manner that no repairs thereto shall be required for the term of five years after its completion." And it was held, distinguishing *People v. Maher*, *supra*, that the clause referred to had reference solely to the substantial character of the work performed and materials used in the performance of the contract. A like distinction is observed in *Cole v. People*, 161 Ill. 16 (43 N. E. 607). But the bond in question is distinctively an independent undertaking to keep the street and pavement in repair, made so both by the ordinance and the language thereof, covering, in effect, all injuries liable to arise from whatsoever source. It is clear that under the authorities, based upon what we believe to be sound reasoning, the assessment against property to meet the additional expense of such repairs was unwarranted by the charter.

But it does not follow that, because the assessment is void in so far as it may provide for the especial fund which forms the consideration for the bond, the bond itself is invalid and illegal and not capable of being enforced, if authority is found elsewhere for the city to enter into such a contract with the paving company:

Portland Lumbering Co. v. City of East Portland, 18 Or. 21 (6 L. R. A. 290, 22 Pac. 536). But there was an evident lack of statutory power for entering into a contract for keeping and maintaining the street and pavement in repair, and consequently a want of legal authority to use the public moneys for that purpose. Under the charter the council was required to provide for taking security by good and sufficient bonds for the faithful performance of any contract let under its authority: City Charter 1891, § 116. It was authorized to let contracts for the repair of streets where present necessities required, or which may have been deemed expedient by the common council, but not to expend the funds of the public or the property owners of the municipality, and let contracts for anticipated future repairs. And this is just what it has attempted to do.

Upon the other hand, it is strongly urged by plaintiff that the bond can be enforced as a common-law obligation, and of this we will now inquire. It has been held by this court that bonds or undertakings intended to be given in compliance with statutes, although having failed in substantial compliance therewith, will, if entered into voluntarily, and founded upon a valid consideration, and they do not violate public policy or contravene any statute, be enforced as common-law obligations: *Bunne-man v. Wagner*, 16 Or. 433, (8 Am. St. Rep. 306, 18 Pac. 841). The rule is, perhaps, more tersely stated by the supreme court of the United States, that, if a contract is entered into by competent parties, and for a lawful purpose, not prohibited by law, and is founded upon a sufficient consideration, it is a valid contract at common law: *U. S. v. Tingey*, 30 U. S., (5 Pet.) 115; *U. S. v. Linn*, 40 U. S., (15 Pet.) 290. That the bond in question was entered into voluntarily cannot be gainsaid, and the sufficiency of the consideration must also be conceded.

The question remains, is the obligation void as against the sureties of the obligor, for it is they who are prosecuting this appeal. It is a general rule of law that, where the obligor has obtained and availed himself of the benefits to be derived from the execution of the bond, neither he nor his sureties can defeat their liability because of some irregularity in the proceeding in which the bond originated. Having obtained the benefit, they are estopped from setting up the irregularity : *Carlton v. Dixon*, 12 Or. 148, (6 Pac. 500) ; *Johnson v. Weatherwax*, 9 Kan. 75 ; *Nunn v. Goodlett*, 10 Ark. 89. So it has been held that an obligor will not be permitted to defeat his liability by showing want of jurisdiction in the court before whom the action was pending, or the unconstitutionality of the law by virtue of which the bond or obligation had its inception : *McDermott v. Isbell*, 4 Cal. 113 ; *State ex rel. v. Stark*, 75 Mo. 566 ; *Daniels v. Tearney*, 102 U. S. 415. In the latter case an action was sustained upon a bond given under and by virtue of an ordinance of the state of Virginia, which was held by the national courts to be unconstitutional and invalid by reason of the treasonable motive and purpose by which its authors were animated in passing it. Mr. Justice SWAYNE, speaking for the unanimous court, says : " It is well settled, as a general proposition, subject to certain exceptions, not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others, not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel operates with full force and conclusive effect." The following, among other, cases are cited in support of the doctrine : *Ferguson v. Landram*, 5 Bush. 230 ; 96 Am. Dec. 350 ; *Railroad*

Feb. 1898.] PORTLAND v. BITUMINOUS PAVING CO. 319

Co. v. Stewart, 39 Iowa, 267; *Van Hook v. Whitlock*, 26 Wend. 43; 37 Am. Dec. 246; *City of Burlington v. Gilbert*, 31 Iowa, 356; 7 Am. Rep. 143; *U. S. v. Hodson*, 77 U. S. (10 Wall) 409.

But here another and a different principle is involved. A municipality with limited and circumscribed powers and authority is a party to the contract, and the validity thereof depends for its support upon the requisite power of the city to enter into and enforce it. It is a doctrine of all the authorities that, if a municipality acts wholly beyond the scope of its express or implied authority, it is not estopped to set up that fact to defeat any alleged claim or demand arising by virtue of such unauthorized acts, and it is said that neither the doctrine of estoppel, of ratification, nor of *bona fide* holding can be invoked to support such a transaction: *Sutro v. Pettit*, 74 Cal. 332 (16 Pac. 7, 5 Am. St. Rep. 442). "This doctrine," says Dillon, "grows out of the nature of such institutions, and rests upon reasonable and solid grounds": 1 Dill. Mun. Corp. § 457. It is essential to the welfare and protection of citizens and taxpayers who contribute to the revenues, and whose property is subject to the laws and ordinances of municipalities, that they should be held to the exercise of such powers only as have been delegated to them through legislative enactment. They possess no powers but such as are delegated, or may be necessary to their exercise, and thereby implied, and the courts have been solicitous that they exercise none that they do not possess. Their creation being by public statute, and for definite and legitimate objects, to which their funds are to be applied, contracts which have no connection with such purposes, or which, by natural intendment, will cause an illegal or wrongful application of their funds or the funds of their citizens with which they are intrusted by chartered powers, or an application to other or foreign

objects, are *ultra vires*, and void : 2 Dillon Mun. Corp. § 936. In *Newbery v. Fox*, 37 Minn. 141 (5 Am. St. Rep. 830, 33 N. W. 333), it is said : "The doctrine of *ultra vires* has, with good reason, been applied with greater strictness to municipal bodies than to private corporations ; and, in general, a municipality is not estopped from denying the validity of a contract made by its officers, when there has been no authority for making such a contract. * * * A different rule of law would, in effect, vastly enlarge the power of public agents to bind a municipality by contracts, not only unauthorized, but prohibited, by law. It would tend to nullify the limitations and restrictions imposed with respect to the powers of such agents, and to a dangerous extent expose the public to the very evils and abuses which such limitations are designed to prevent."

A distinction is recognized between acts of the municipality or governing body, which are not within the scope of their general powers, and such as may be open to the objection that they are lacking in some technical and formal regularity in their adoption, or that there has been a non-observance of some collateral act or formality prescribed, not jurisdictional in its character. The former are clearly and always void, while the latter, if they lead to a perpetration of a fraud upon contracting parties acting upon the faith of laws and ordinances apparently regular and valid, will be held to bind the municipality upon the principle of having received and appropriated benefits derived on account of them, and it will be estopped to deny their validity. *Moore v. Mayor, etc., of City of New York*, 73 N. Y. 245 (29 Am. Rep. 134). Thus, in *Hitchcock v. Galveston*, 96 U. S. 341, it was held that, where the municipality had the power to contract for the improvement of the sidewalks, but in making such a contract it agreed to pay by giving

its bonds, which it had no authority to do, and, having received benefits at the expense of the other contracting party, it could not object that it was not empowered to make payment in the mode sought to be adopted, and that, while the city could not be held to a specific performance of its undertaking, yet that it was liable to pay the contractor under the contract. The principle is recognized, and pertinently discussed, by Mr. Justice STRAHAN in *Portland Lumbering Co. v. City of East Portland*, 18 Or. 21, (6 L. R. A. 290, 22 Pac. 536) wherein a technical defect in a notice required by the statutory procedure in levying a local assessment was urged as a defense. He says: "I do not think, under the charter, this technical defect in the notice destroyed or impaired the power of the city to contract. * * * The defendant's claim is not that the general power did not exist, but there was a slight departure from the authority conferred in the particular already pointed out, and for that reason the whole proceeding was *ultra vires* and void. Under the circumstances of the case, I am unable to accede to this argument."

It must be conceded that a municipality will be estopped to enforce the performance of a contract under the same or like conditions that an individual will be estopped to proceed against it. If it has exceeded its general powers in attempting to enter into contractual relations with an individual, and if, because of its exercise of such excess of authority, the individual, who is charged with knowledge of its just powers, is left without remedy, there is no good or sufficient reason why the city should not, under like circumstances, be estopped to proceed against the individual. The contract is invalid by reason of the lack of power to enter into it, and, if invalid as to one of the contracting parties, it is also

invalid as to the other. "So, on the other hand," says Mr. Dillon, "a party making with the city a contract which is *ultra vires* is not estopped, when sued thereon by the corporation for damages, to set up its want of authority to make it": 1 Dillon, Mun. Corp. § 458. It is sometimes asserted that a contract made by a municipal corporation, where there exists a defect of power, or even a want of power to so contract, yet if not made in violation of charter regulations or any statute prohibiting, is not illegal; and, if such a contract has been executed, and benefits have been received and appropriated, the party receiving them is estopped to deny its validity: *City of St. Louis v. Davidson*, 102 Mo. 149 (22 Am. St. Rep. 764, 14 S. W. 825). *State Board of Agriculture v. Citizens' St. Ry. Co.* 47 Ind. 407 (17 Am. Rep. 702) is to the same effect as applied to a private corporation. This doctrine has been criticised as too broad and unsound, and contrary to the great weight of authority. 1 Beach, Pub. Corp. §§ 217, 218. But, however this may be, it is not thought to be entirely applicable to the case at bar.

It, as we have seen, was clearly beyond the express or implied powers granted to the city to contract for keeping and maintaining the street and pavement in repair against injuries that might arise from all causes for the period of five years. If it could contract for this length of time in the future, why not for a much longer, or even an indefinite time, and use the funds of the city or abutting property owners for payment in advance? It is undoubtedly a duty which is due to the public, and enjoined upon the city, to see that the streets are kept in reasonable repair. But the mode of making repairs is specifically pointed out and limited to present necessities, and thereby constitutes the measure of power; and, being the only manner designated, must be con-

strued as a prohibition of any other method. That is to say, the city is not only powerless to adopt any other mode or method, or to expend the public moneys in its promotion, but it is prohibited from proceeding in any other manner. While the contract has been fully executed on the part of the city, yet it cannot, by reason of its invalidity, recover damages on account of a breach thereof. In further support of these views, see *McDonald v. Mayor of New York*, 68 N. Y. 23 (23 Am. Rep. 144) ; *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543 (99 Am. Dec. 300) ; *Nash v. City of St. Paul*, 8 Minn. 172 (Gil. 143) ; *Covington R. Co. v. Mayor of Athens*, 85 Ga. 367, (11 S. E. 663) ; 1 Beach, Pub. Corp. § 217 ; *Town of Durango v. Pennington*, 8 Colo. 257 (7 Pac. 14).

We have come to this conclusion after much and careful deliberation, because of the importance of the matters involved, but we are satisfied that the rule touching the invalidity of the acts of a municipal corporation where entirely beyond the general scope of its powers is the only safe one, in view of the safeguards which should always be maintained against the unauthorized acts of the authorities and the illegal use of the funds of municipalities. The judgment must, therefore, be reversed, and the cause remanded, with directions to the court below to sustain the demurrer.

REVERSED.

Decided at PENDLETON, 13 August, 1898.

TOWNLEY v. OREGON RAILROAD COMPANY.

[54 Pac. 150]

INJURIES TO PREMISES—RIGHTS OF LESSEE.—A lessee in possession of property which is destroyed through another's negligence may recover the value of its use for the unexpired term of the lease.

COMPETENCY OF OPINION EVIDENCE.—Plaintiff in an action for property injured and destroyed by defendant's negligence cannot, without laying the foundation therefor by showing that he is possessed of sufficient knowledge

38	323
40	88
33	323
42	236

to form an intelligent estimate, give his opinion as to the value of the different articles of property injured and destroyed: *Oregon Pottery Company v. Kern*, 80 Oregon, 328, followed.

APPEAL—HARMLESS ERROR.—Error in admitting incompetent evidence as to the value of articles injured or destroyed by fire set by defendant's negligence cannot be regarded as harmless because competent evidence was subsequently given as to the value of some of such articles, where the verdict is for a gross sum. In such a case there is no means of telling whether the competent or incompetent evidence decided the jury: *Krewson v. Purdom*, 15 Or. 589, and *State ex rel. v. Kraft*, 18 Or. 550, distinguished.

From Union: ROBERT EAKIN, Judge.

Action by W. J. Townley, as a trustee, against the Oregon Railroad & Navigation Co. for damages, and from it the defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Joel M. Long* and *Thos. H. Crawford*, with an oral argument by *Mr. Long*.

For respondent there was a brief over the names of *Chamberlain & Thomas* and *J. M. Carroll*, with an oral argument by *Mr. George E. Chamberlain*.

MR. JUSTICE BEAN delivered the opinion.

This is an appeal from a judgment of the circuit court of Union County, given in favor of the plaintiff, in an action brought to recover damages for injuries alleged to have resulted from defendant's negligence in burning grass and other combustible material on or near its right of way. The complaint is: That on October 9, 1896, the plaintiff was entitled to and in the possession, as the trustee of an express trust for and on behalf of James Raymond, of a 3,500-acre tract of land adjoining the defendant's right of way in Union County, together with all the personal property kept and used upon such premises, including 21½ tons of hay, a Randolph header, and an Os-

borne binder ; that 720 acres of said land is what is commonly known as turf or peat land, of a combustible character, and easily ignited when dry, and 700 acres thereof was, at the time referred to, covered with a heavy growth of grass, and 15 acres with ripe standing grain ; that on the day named the servants and employees of the defendant carelessly and negligently set out and caused to be set out fire along that part of defendants right of way contiguous to plaintiff's land, and so carelessly managed the same that such fire burned up and destroyed about 5 acres of grass, and on the following day negligently and carelessly suffered and permitted such fire to escape from their control, and burn up and destroy about 700 acres of grass, of the value of \$1,051 ; 15 acres of grain, valued at \$120 ; 21½ tons of hay, valued at \$107.50 ; 1 header, of the value of \$150 ; and 1 binder, of the value of \$100. The defendant by its answer, denies all the material allegations of the complaint, and for an affirmative defense alleges that whatever damage was done to the plaintiff was caused by a fire set by himself and employees on the 8th of October, 1896, and by them negligently and carelessly allowed to spread over his premises. The evidence discloses that on May 6, 1896, one James Raymond, who was in possession of the tract in question under a lease expiring on the 23d of the following December, and the owner of the personal property described in the complaint, transferred by an instrument in writing his leasehold interest and such personal property to the plaintiff, in trust to secure the payment of a certain promissory note for \$6,000, signed by himself and the plaintiff. By the terms of such instrument the plaintiff was to take and retain possession of the personal property and the leased premises, use and control the same, harvest and sell the growing crop to the best advantage, and out of the proceeds pay the expenses of his trust,

and satisfy such note, and the overplus, if any, pay over to Raymond. Immediately upon the execution of the instrument the plaintiff claims to have gone into the possession and control of the property described therein as such trustee, and to have been so in possession at the time of the grievance complained of.

A few days before the time alleged in the complaint, he caused to be plowed two parallel strips of land a rod wide and about twenty feet apart along and parallel to the defendant's track as a firebreak, to prevent such fires as might be caused by defendant's engines from overrunning his land. At this time that section of country was dry, and the land in possession of plaintiff adjoining the right of way, being dry, peaty soil, covered with grass and weeds, was very susceptible to fire. Notwithstanding these conditions, the section hands of defendant, on the ninth of October, set fire to the grass, weeds, and other combustible material on the strip of land between the two firebreaks referred to for the purpose of burning the same off, and by this means to lessen the danger of accidental fires set by its engines escaping onto the adjoining land. They began their work at the south line of the premises in question, and proceeded north, keeping the fire under control until they reached the wagon road, when it escaped over and across the road, and commenced burning in the grass and weeds on the plaintiff's land north thereof. About this time plaintiff's foreman, fearing that the fire had got beyond control of the defendant's servants, rode out to where it was burning, and after consultation with them it was thought advisable to have a firebreak plowed between the fire and the land in plaintiff's possession to prevent the further progress of the fire. In pursuance of this understanding, the foreman directed one of the employees on the ranch to plow a strip of land from the

wagon road northerly to a creek some two hundred feet distant, which was done accordingly. After this the section men and plaintiff's servants extinguished all the fire then visible, and some time in the afternoon or evening left the premises, believing, as the defendant claims, that there was no further danger, and that the fire was practically extinguished. The evidence tends to show, however, that the fire was still alive and smoldering in the turf and dry peatish soil, and on the next morning was fanned into a flame by the wind, and, escaping over the firebreak plowed the day before, ran over some seven hundred acres of said tract, consuming the grass and other growth thereon, burning the hay, and damaging the header and binder.

The record contains some seventy-one assignments of error, but those upon which defendant seeks to secure the reversal of the case may be summarized as follows : (1) In admitting evidence as to plaintiff's title and right to the possession of the premises burned over, and in refusing to direct the jury not to consider as an item of damage in the case any injury to the grass and pasture land ; (2) in permitting the plaintiff to give his opinion as to the value of the property destroyed, without any foundation having been laid therefor ; (3) in allowing plaintiff to testify as to conversations between himself and McCarty, the defendant's section foreman, before the fire in question was set out, about burning off the right of way ; (4) in refusing to give certain instructions requested by the defendant.

1. Upon the first point the contention is that the court erred in admitting as evidence the lease under which Raymond held possession of the premises, and the instrument assigning his interest thereunder to the plaintiff, and in refusing to instruct the jury that plaintiff could

not recover for the grass and pasture destroyed by the fire, for the reason that such damages inure to the freehold, and the plaintiff had failed to prove that Raymond's lessor had title to the land, or authority to make the lease in question. It has been held that the title necessary to maintain an action of this character is the same as in an action of trespass *quare clausum fregit*, and hence a person who is in the actual possession and occupancy of land may recover for damages done to the land itself by fire, caused by the negligence of a railway company in operating its road, without proof of a paper title, unless the defendant shows an outstanding adverse title to the land higher than a mere possessory one: *McNarra v. Chicago & N. W. Railway Co.*, 41 Wis. 69. But it is unnecessary to invoke this rule in the case at hand, because the court charged the jury that they were not at liberty to consider any damage to the land itself, but only the "value of the use of the pasture of the ground burned over" for the unexpired portion of the lease, and therefore defendant's objection that plaintiff did not show title to the realty is without merit. If he was in possession, claiming the right under a lease which, by its terms, expired in the following December, he clearly had a right to maintain an action against a trespasser for interfering with such possession or the use and enjoyment of the leased premises.

2. It is also claimed that the court erred in allowing the plaintiff to testify as to his opinion of the value of the property destroyed, without showing that he possessed sufficient knowledge on the subject to form an opinion. Upon this point the record discloses that the plaintiff, after describing the property injured and destroyed by the fire, and without any foundation having been laid for the admission of such evidence, or any examination

of the witness to show that he knew anything whatever about the value of machinery, hay, grain, standing wheat, or pasture land, was permitted to give an opinion as to the value of each item of such property destroyed and injured by the fire. Timely objection was made to the introduction of this evidence on the ground that the witness had not shown himself qualified to give an opinion, and after its introduction the defendant moved to strike out for the same reason, and also requested the court to instruct the jury to disregard it. These objections were all overruled, and this was error. There is no possible ground, so far as we have been able to ascertain, upon which the admissibility of the testimony can be sustained, and none has been suggested by plaintiff's counsel. The rule is too well settled to be longer open to debate that a witness cannot be permitted to testify to his opinion as to the value of property without first laying a foundation for such testimony by showing that he is possessed of sufficient knowledge upon the subject to form an intelligent opinion: *Oregon Pottery Co. v. Kern*, 30 Or. 328 (47 Pac. 917); *Haight v. Kimbark*, 51 Iowa, 13 (50 N. W. 577). No such showing was made or attempted in this case. Indeed, it does not appear that the witness had any knowledge whatever of the value of the property in question.

3. Counsel for the plaintiff, however, contends that the error in the admission of this evidence was harmless, because witnesses were subsequently called by the defendant who were admittedly competent to testify on the subject of the value of some of the articles destroyed and injured by the fire, and did so testify. As a general proposition, a judgment will not be reversed on account of the improper admission of testimony if the facts sought to be thus proved were clearly established by

other evidence, so that it can be seen that the party complaining was not prejudiced by the admission of such testimony, and that the verdict must have been the same if it had not been admitted: *Krewson v. Purdom*, 15 Or. 589 (16 Pac. 480); *State ex rel. v. Kraft*, 18 Or. 550 (23 Pac. 663). But there is no room here for the application of this rule, because the verdict is for a gross sum, made up of sundry items of damages, and there is no way of determining from the record by what evidence the jury were influenced in arriving at their verdict. The repeated rulings of the trial court that plaintiff's testimony was competent, and its refusal to withdraw it from the jury, clearly authorized them to consider it as proper testimony in the case, bearing on the question of damages, and the verdict affords no evidence of the basis upon which the jury arrived at the amount of damages. Under such circumstances the court cannot say that the error was harmless.

From these conclusions it follows that the judgment must be reversed, and as the other questions discussed in the brief and by counsel at the hearing, interesting and important as they are, may not arise on another trial, or, if so, may be presented in a different form, it is thought best not to anticipate them at this time. The judgment is therefore reversed, and the cause remanded for a new trial.

REVERSED.

Decided at PENDLETON, 13 August, 1888.

MULLANEY v. EVANS.

[54 Pac. 886]

RATIFICATION OF ACTS OF AGENT.—Plaintiff by bringing an action for the balance due under a contract for the sale of certain chattels, and defendants by accepting the chattels and paying part of the purchase price therefor, each with full knowledge of the transaction, ratified the contract, notwithstanding that their respective agents who executed it acted without authority.

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48	336

HARMLESS ERROR.—The admission of the testimony of a party that she did not sign a contract in writing, though not material, is not reversible error, where the contract itself is introduced in evidence and discloses on its face that she did not sign the same.

EVIDENCE.—Plaintiff may, in support of her contention that the money due on a sale of her property by her agent should have been paid to her instead of to a garnishing creditor of the agent, testify that the purchasers paid her through such agent a certain amount on account of the purchase.

HARMLESS ERROR.—Where evidence tends to disprove the claim of the party offering it, it is harmless, even though inadmissible.

EVIDENCE—SALES.—It is competent for the purpose of establishing the plaintiff's right to recover the balance of the purchase price due under a contract of sale executed by her husband acting as her agent to show that the property sold belonged to her.

LIABILITY OF GARNISHEE.—A purchaser of property under a contract with the owner's agent is not protected against the claim of the owner for the purchase price by payment to a creditor of the agent under a garnishment judgment, where he knew of the plaintiff's ownership of the property and claim to the purchase price in time to have so stated in the answer to the garnishment but did not do so.

INCONSISTENT INSTRUCTIONS.—Appellant cannot complain of the inconsistency of different instructions where the inconsistency resulted from the giving of instructions proffered by him which were not germane to the issue.

From Malheur: MORTON D. CLIFFORD, Judge.

Action by Louise W. Mullaney against R. T. Evans, A. S. Evans, and H. Curtner, co-partners as Evans & Curtner. From a judgment in favor of plaintiff, defendants appeal.

AFFIRMED.

Mr. William Smith for appellants.

Messrs. John L. Rand and Lionel R. Webster for respondent.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is an action by Louise W. Mullaney against R. T. Evans, A. S. Evans, and H. Curtner, co-partners as Evans & Curtner, to recover the sum of \$1,670, the balance due on account of the alleged sale and delivery of a quantity of hay by plaintiff to defendants. The de-

defendants, after denying the material allegations of the complaint, allege that, with plaintiff's knowledge, her husband, E. F. Mullaney, entered into a contract with them, whereby he sold and delivered to them a quantity of hay, the price of which, prior to September 20, 1895, they had fully paid, except the sum of \$1,670; that about October 1, 1895, the First National Bank of Winnemucca, Nevada, commenced an action in the circuit court of Malheur County against said E. F. Mullaney to recover the sum of about \$12,000, and caused said debt to be attached by the sheriff of said county, to whom they delivered a certificate acknowledging that they were indebted to said E. F. Mullaney in the sum of \$1,670; that such proceedings were had in said action that judgment was rendered against Mullaney for the amount demanded, and against defendants for the amount so admitted to be due from them to him, which sum, prior to the commencement of this action, they had fully paid to said bank. The plaintiff, having denied in the reply the material allegations of new matter contained in the answer, alleged that at the time said contract was entered into defendants knew that she was the owner of said hay, and entitled to the proceeds derived from the sale thereof, notwithstanding which they conspired with said bank to deprive her of the money arising therefrom, and falsely furnished said certificate, well knowing that said sum of \$1,670 was payable to her; that plaintiff notified defendants, after they had furnished said certificate, and long prior to the rendition of judgment in said action, that the statement that they were indebted to E. F. Mullaney was false, but they refused to amend or correct such certificate. Upon these issues a trial was had, resulting in a verdict in plaintiff's favor for the amount demanded, whereupon defendants moved the court for judgment in their favor *non obstante*; but, the

motion being denied, judgment was rendered upon the verdict, and defendants appeal.

It is contended by defendants' counsel that their clients entered into an agreement with plaintiff's agent, E. F. Mullaney, which they have so kept and performed as to preclude him from maintaining an action for the recovery of the balance claimed to be due, and that, such contract having been consummated with plaintiff's knowledge, her right of action thereon is also barred. The contract in question purports to have been entered into between Evans & Curtner, parties of the first part, and E. F. Mullaney, the party of the second part; but the name of one Frank Maxey is subscribed thereto with the party of the second part, but the instrument contains no recital of any authority by which the latter appended his signature. The manner of executing the contract, however, is unimportant, for plaintiff, by bringing an action for the balance due thereunder, and defendants by accepting the hay, and paying E. F. Mullaney a part of the purchase price, each with full knowledge of the transaction, have thereby ratified the agreement, notwithstanding their respective agents may have acted without authority: *Argenti v. Brannan*, 5 Cal. 351; *McDonald v. Mining Co.*, 13 Cal. 220. Parol testimony is inadmissible to discharge Mullaney, if he executed the contract for plaintiff without disclosing his principal to the defendants, in which case they have the right to elect whether they will hold him or his wife to a performance of the agreement: *Barbre v. Goodale*, 28 Or. 465 (38 Pac. 67, and 43 Pac. 378). But the hay agreed to be sold having been delivered to defendants, in pursuance of the contract, plaintiff, by its ratification, has fully complied with all the terms imposed upon her, whereupon it devolved upon defendants to keep their engagements by paying the amount agreed upon; and

it can be of no consequence to them whether this sum is payable to plaintiff or to her husband. If E. F. Mullaney had owned the hay, and, after having sold and delivered it to defendants, he had assigned the account to plaintiff, for a valuable consideration, prior to the attachment, she would undoubtedly have been entitled, under the very liberal provisions of the married women's act of this state, to recover from them the amount due under the contract, or if they had been notified of such assignment after they had given their certificate, but before the judgment was rendered, they might have been relieved from all liability to the bank. So, too, if they knew that plaintiff was the owner of the hay and entitled to the proceeds arising from its sale, notwithstanding which they admitted in their certificate of garnishment that they were indebted to her husband therefor, such admission ought not to relieve them from their liability to plaintiff, for defendants occupied towards all these parties the relation of a stakeholder, which should have compelled them to maintain an indifferent position as to whom they paid for the hay, and hence they could not debar plaintiff of her right to recover its price by admitting that they owed her husband therefor.

With these preliminary observations, we will examine the errors relied upon to secure a reversal of the judgment. Plaintiff, appearing as a witness in her own behalf, testified, in substance, that she sold the hay to defendants, and that the contract evidencing the transfer thereof was reduced to writing; whereupon her counsel asked the following question: "Did you sign any contract in writing, Mrs. Mullaney?" This question was objected to on the ground that it was incompetent, irrelevant, and immaterial, and because the evidence showed that the agreement was signed for her, and with her knowledge. The objection being overruled, and an ex-

ception allowed, the witness answered, "No, sir; I did not." This answer may not have been very material, but we fail to see how it was prejudicial, or was calculated to mislead the jury; for the contract, having been offered in evidence, disclosed the fact that it was not signed by plaintiff, so that the testimony objected to was corroborative of the writing only.

This witness, over defendants' objection and exception, was allowed to answer the following question: "Mrs. Mullaney, you may state whether or not the defendants paid you any money for that hay, and, if so, how much, and when?" To which she replied, "They paid me \$625 on hay." It is insisted that this question and the answer thereto furnished a method of proving by parol the non-performance of a written contract, without having established by proper legal proof any liability of the defendants to pay under the agreement. Defendants, by their answer, admitted that they made the contract in question, and this averment established their liability. They also alleged that \$1,670 was the balance due on account of the purchase of the hay, and this admission showed that a payment of the amount so testified to by plaintiff had been made by them, but they maintain, however, that this payment was made to E. F. Mullaney, while plaintiff insists on this money having been paid to her through her husband on account of her alleged sale. The real question in the case is, to whom was the admitted balance payable? Under the allegations of the complaint and reply, we think the testimony admissible as tending to establish plaintiff's theory of the case, even if the money so received was paid by defendants to her husband.

The contract having been identified by plaintiff, she was permitted, over defendants' objection and exception, to answer the following question in relation to the per-

sons present when the agreement was entered into, viz. : " You may state whether or not at that time the firm of Evans & Curtner, or either of the partners of that firm, were present ? " To which she replied, " They were not. " The object of the question, as we understand it, was to show that defendants, at the time the contract was executed, had knowledge that plaintiff claimed to own the hay ; and, plaintiff's averment to that effect being in issue, the inquiry was admissible, but, as a matter of fact, her evidence tended to disprove the issue, so that, in any event, its admission could not have been prejudicial.

E. F. Mullaney, being called as a witness for plaintiff, testified in relation to the sale of the hay by his wife, whereupon he was asked the following question : " Whose hay was it that she sold, Mr. Mullaney ? " and over defendants' objection and exception he was permitted to answer, " Mrs. Mullaney's. " It is insisted that, as the contract was in writing, and signed by Mullaney, it is unimportant whether the hay was owned by him or his wife, and hence this question was immaterial, and tended to mislead the jury to defendants' prejudice. The point contended for might, perhaps, be well taken if this were an action by defendants against Mullaney to recover damages resulting from a breach of his agreement to deliver the hay ; but plaintiff's right of action being predicted on her alleged ownership, the question was important, and the answer thereto material.

The court having charged the jury to the effect that if defendants, when they made their answer to the notice of garnishment, knew or had reason to believe that plaintiff owned the hay, or claimed the balance due thereon, it was incumbent upon them to have so stated the fact ; but, if they neglected so to certify, they were not protected by the judgment rendered against E. F. Mullaney,

and a verdict should be returned in this action for the amount demanded. An exception to this portion of the charge having been allowed, it is maintained that, E. F. Mullaney having signed the contract in question, defendants had the right to rely thereon, and to treat him as the principal; that they were at liberty to disregard any claim of ownership to the hay which plaintiff might insist upon, after the execution of the agreement; and that the judgment of the bank against Mullaney affords a complete bar to the maintenance of plaintiff's action. It must be admitted that defendants had a right of election, and could treat Mullaney as the principal, but only to the extent of requiring him to keep his engagements; and for any failure in this respect defendants had a remedy in damages. If plaintiff was the owner of the hay, and entitled to the money due therefor, and defendants had knowledge of this fact at the time they furnished the certificate of garnishment, we fail to see how they can escape liability to her by claiming that they were indebted to her husband. The plaintiff was not a party or privy to the action instituted by the First National Bank of Winnemucca against E. F. Mullaney, and, since she cannot be deprived of her property without due process of law, in which she has had notice, and an opportunity to be heard, defendants cannot plead in bar of her action the judgment rendered against her husband, or any payments made on account thereof: *Lawrence v. Lane*, 4 Gilman, 354; *Cooper v. McClun*, 16 Ill. 435; *Wise v. Hilton*, 4 Me. 435; *Miller v. McClain*, 10 Yerg. 245; *Funkhouser v. How*, 24 Mo. 44; *Dobbins v. Hyde*, 37 Mo. 114; *Wilson v. Murphy*, 45 Mo. 409.

After the court had fully instructed the jury upon the questions of law applicable to the case at bar, it gave, at defendants' request, certain instructions which appear to

be somewhat in conflict with the other portions of the charge, in view of which their counsel contend that the jury, considering the charge as a whole, could not reconcile these incongruities, or reach an intelligent verdict from the instructions. But it will be observed that the incongruity results from the latter instructions, which were clearly not germane to the issue, but, being favorable to the defendants' contention, and given at their request, they are not in a position to complain of the inconsistency referred to. An examination of the evidence relied upon for that purpose fails to convince us that the court erred in refusing to render a judgment *non obstante veredicto*.

Defendants objected to other instructions given by the court on its own motion or at plaintiff's request, but, in view of what has been said herein, we deem the exceptions to be without merit. It follows that the judgment is affirmed.

AFFIRMED.

* Decided at PENDLETON, August 13; rehearing denied Dec. 19, 1898.

MUNICIPAL SECURITY CO. v. BAKER COUNTY.

[54 Pac. 174]

ESTOPPEL TO DENY EQUITABLE JURISDICTION.—An objection in an equity suit that plaintiff has an adequate remedy at law cannot be raised by a defendant who has by his own answer asked equitable relief: *Kitchenside v. Myers*, 10 Or. 21, and *O'Hara v. Parker*, 27 Or. 157, approved.

COUNTY INDEBTEDNESS—CONSTRUCTION OF CONSTITUTION.—The prohibition against counties contracting indebtedness above a specified amount, under Art. XI, § 10 of the constitution, applies only to such debts and liabilities as they may voluntarily incur or create, and not to those that are thrust upon them by operation of law and which they are powerless to prevent: *Grant County v. Lake County*, 17 Or. 453, and *Burnett v. Markley*, 23 Or. 436, approved.

COUNTIES—RULE FOR APPLYING LAW AGAINST DEBTS.—The taxpayers should have the benefit of the doubt and be protected by the constitutional prohibition against voluntary indebtedness, where it is not entirely certain that the obligation had to be incurred—in other words, there should be a clear warrant of law for every county expenditure or it will be a voluntary indebtedness.

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89 397
90 330
91 408

88 338
41 185

33 338
43 471
44 472
33 338
44 82

VOLUNTARY DEBT—SHELVING FOR VAULT—INSURANCE.—A county is not by law obligated to provide shelving or boxing for the vaults where its records are kept, nor is it compelled to insure its property, and indebtedness incurred for either of these purposes is entirely voluntary.

DEBT LIMIT—BRIDGES.—An indebtedness incurred by a county in constructing or repairing bridges is a voluntary obligation, within the prohibition against county indebtedness contained in the constitution, Art. XI, § 10, for Hill's Ann. Laws, § 4140 distinctly provides that county courts "may * * * in their discretion" expend public funds for bridges.

EXPENSES OF COUNTY BUILDINGS.—Under Hill's Ann. Laws, § 806, subd. 1, the expense of erecting or repairing necessary county buildings is not an obligation imposed on the county by operation of law.

PURCHASE OF TOLL ROADS—PAYMENT OF SCALP BOUNTIES.—It is not necessary to the performance of its corporate functions that a county shall buy toll roads or pay a bounty for scalps, and any indebtedness incurred for such purposes is purely voluntary.

APPROPRIATION OF CURRENT REVENUES TO VOLUNTARY INDEBTEDNESS.—Unappropriated current revenues of a county including those which are past due and uncollected cannot be anticipated by voluntary indebtedness of the county, especially where the county is otherwise largely indebted for ordinary current expenses: *Salem Water Co. v. City of Salem*, 5 Or. 29, cited and applied.

EXPENSE OF POOR FARM IS VOLUNTARY.—County warrants representing the purchase of a poor farm are within the prohibition of the Const., Art. XI, § 10, against counties voluntarily creating indebtedness beyond a specified amount.

EXPENSES OF REINDEXING AND REPLATTING RECORDS.—Under a statute that a certain officer should receive for certain work "such compensation as the county judge and county commissioner may deem sufficient" it is discretionary with the officials to order such work done or leave it undone, and the expense, if it is done, is wholly voluntary, under the inhibition of the constitution, article XI, § 10.

WARRANTS FOR MORE THAN THE INDEBTEDNESS.—County warrants are void where a percentage is added to the amount due in order to bring the warrants to a cash basis in the market.

EXPERT EXAMINATION OF BOOKS OF PUBLIC OFFICERS.—Warrants issued for posting up public records that are behind and for experting books of the county officers are necessary expenses of conducting a county imposed by law.

PAYMENT OF UNLAWFUL INDEBTEDNESS NOT AN ESTOPPEL—AGENCY.—The payment by the county authorities of warrants issued for unlawful claims, with full knowledge of that fact, does not estop taxpayers or the county from asserting the invalidity of other outstanding claims of the same nature, for no county agent or official could ratify an act that he could not have done originally.

ESTOPPEL BY RECEIVING BENEFIT.—The fact that a county has received benefits thereby does not preclude it from asserting the unlawfulness of warrants issued for voluntary obligations in excess of the constitutional limit.

ESTOPPEL BY APPORTIONMENT OF DEBT.—Where no question of the constitutionality of warrants representing a county indebtedness was determined by commissioners appointed to apportion indebtedness between two counties,

neither the counties nor their taxpayers are precluded from asserting the invalidity of such warrants as having been issued in excess of the constitutional limitation.

From Baker: ROBERT EAKIN, Judge.

Suit by the Municipal Security Company, of Portland, Maine, against Baker County, its judge, commissioners, treasurer, and five hundred of its taxpayers to relieve sundry warrants from the effect of the decree in a suit brought by the five hundred defendant taxpayers to enjoin the payment of these and a large number of other warrants. That suit was decided on a demurrer to the complaint, and the appeal was dismissed on a motion without any consideration of its merits: *Stuller v. Baker County*, 30 Or. 294 (47 Pac. 705). Not having been a party to that suit, though then owning some of the warrants that were being attacked, plaintiff now sues to have its warrants declared valid obligations,* and appeals from a decree against it.

AFFIRMED.

For appellant there was a brief and an oral argument by *Messrs. Wm. Smith and Chas. A. Johns*.

For respondent county officers, there was a brief and an oral argument by *Mr. Hugh E. Courtney*, district attorney.

For respondent taxpayers, there was a brief and an oral argument by *Mr. Martin Luther Olmstead*.

MR. JUSTICE WOLVERTON delivered the opinion.

*NOTE.—It was urged by the defendants in the present case that plaintiff was not in a position to maintain this suit, as it was not a taxpayer, or even a resident or citizen, and because there was available a plain, speedy and adequate remedy at law. Owing to the terms of the pleadings the point was not considered.—REPORTER.

This is a suit the avowed purpose of which is to relieve certain Baker County warrants, owned and held by the plaintiff, from the operation of a decree entered in a suit in which plaintiff was not a party, whereby the county treasurer was enjoined from paying and the sheriff from receiving them in payment of taxes, and to restore them to their original condition. The warrants involved consist of Nos. 3,043 to 3,047, inclusive, issued May 5, 1891, to George W. Borman, for \$200 each; No. 2,810, issued March 6th, for \$25, and No. 2,676, issued July 16th, for \$59, to the same party; thirteen of those numbered from 3,812, to 3,837, class L, inclusive, one of which is for \$50, and the remaining twelve for \$100 each, issued to George M. Chambers, August 17, 1891; nineteen, ranging in numbers from 3,284 to 3,302, class L, inclusive, for \$25 each, issued to C. H. Whitney, May 15, 1891; No. 3,543, class K, issued to G. D. Barnard & Co., July 13, 1891, for \$542.90; and No. 3,646, class L, issued to James Ferguson, July 13, 1891, for \$149.40. All these warrants were presented to the county treasurer soon after their issuance, and indorsed, "Not paid for want of funds." The warrants issued to Borman purport to be for indexing records; to Chambers, for purchase of poor farm; to Whitney, for work on county books; the one to Barnard & Co., for purchase of shelving for records; and the one to Ferguson, for insurance.

The defendants, among whom are included many taxpayers of the county, interposed several defenses, among which are (1) that the Borman and Whitney warrants were issued in fraud of the county, and without authority of law, for pretended services of the said Borman and Whitney, which were never authorized; and (2) that all the liabilities created by the issuance of such warrants were voluntarily assumed by the county; and that, at the date of their issue, the county was indebted

in about the sum of \$200,000, of which more than \$20,000 was voluntarily incurred, and not created for suppressing insurrection or repelling invasion, by reason whereof said warrants and the indebtedness imposed thereby are unconstitutional and void. In connection with these defenses, it is alleged that all such warrants are outstanding and uncanceled, and are claimed by plaintiff to be valid and subsisting demands against the county, which said plaintiff is endeavoring to enforce, and prays that they be cancelled as illegal and void, and the plaintiff enjoined from further attempts to enforce payment thereof.

The further and separate reply alleges: (1) That, at the date of the issuance of such warrants, there were taxes duly and regularly assessed and levied upon the property subject to taxation in Baker County, and which was then due and collectible to the amount of \$50,000, and which was thereafter collected in due course; (2) that much of the indebtedness which defendants claim to have been voluntarily incurred and outstanding at the time of the issuance of such warrants has since been paid by the regularly constituted authorities of the county, and has been recognized and treated as legal and valid, and that, by reason thereof, the defendants ought not now be heard to assert or allege the illegality of such as have not been paid, because voluntarily incurred; (3) that the county and defendants have received full value for all of such warrants, and retain and enjoy the use and benefit of the labor and property in consideration for which they were issued, and, therefore, that they should now be estopped to assert their illegality; and (4) that the whole of such indebtedness was recognized by the commission duly appointed to determine the just and *pro rata* proportion of the existing debt of Baker County which Malheur County should pay and assume, and that

defendants ought thereby to be estopped from asserting the illegality of any part of it.

A question was made at the argument, and is somewhat insisted upon in the brief, that a court of equity is without jurisdiction to entertain the cause of suit set forth by the complaint, because plaintiff has an adequate remedy at law; but the defendants have themselves, by their answer, sought and demanded equitable relief, which precludes them from raising the question: *Kitcherside v. Myers*, 10 Or. 21; *O'Hara v. Parker*, 27 Or. 156 (39 Pac. 1004).

Plaintiff insists that all the indebtedness of the county, represented by the warrants in controversy, and which it is seeking to restore to their original condition, is such as was thrust upon it by operation of law, and that it is entitled to have them paid in due course, as other outstanding warrants are redeemed by the county. The defendants assert the contrary, and claim, further, that at the time said warrants were issued and such indebtedness imposed upon the county, it was indebted upon demands voluntarily incurred in a sum largely in excess of the constitutional limitation of \$5,000. While the latter proposition is not seriously disputed by the plaintiff, it contends that the cash assets of the county were then ample to meet all of such expenses, and hence that the indebtedness thus incurred does not come within the constitutional inhibition. These propositions include about all that is of vital importance touching the controversy. It was held by this court in *Grant County v. Lake County*, 17 Or. 453 (21 Pac. 447), that the constitutional inhibition touching indebtedness created by the counties of the state (Const. Art. 11, § 10) applies only to such debts and liabilities as they might voluntarily incur or create acting in their corporate characters and as artificial persons, and that such as are thrust upon

them by operation of law, and which they are powerless to prevent, as may be instanced the salaries of officers, the expenses of holding court, and the like, do not fall within the purview of its limitations. This construction was recognized in *Wormington v. Pierce*, 22 Or. 606 (30 Pac. 450), and still later approved in *Burnett v. Markley*, 23 Or. 436 (31 Pac. 1050); so that it may now be said to be settled law, and it simply remains for us to apply the organic law as thus interpreted to the facts of the case as disclosed by the testimony.

It is difficult to lay down a rule by which to discriminate clearly between debts voluntarily incurred and those imposed by law. The most important function of the county is to maintain a local government subordinate to, but as an arm of, the state. Now, the expense incident to and necessary under the laws prescribed by the state to organize and maintain such a government may be said to be thrust upon it by law, but such as the county court, acting in its capacity as fiscal agent of the county, has volition to contract, or such as may be wholly within its discretion to impose upon the county or not, as its judgment may dictate, is that against which the constitutional inhibition is directed. The undoubted purpose of this particular clause was to effectually protect persons residing within the county from the abuse of their credit and the consequent oppression of burdensome, if not ruinous, taxation; and it ought to be clear that a county is powerless to prevent before it should be permitted to incur any indebtedness beyond the limits thereby imposed. We mean by this that if there is a doubt whether a debt has been cast upon the county by operation of law, or has been voluntarily created, those who have the burdens to bear consequent upon such determination should have the benefit of the doubt and the protection of the constitution. Officers intrusted with the manage-

ment of public affairs, involving the expenditure and disbursement of public revenues, should be able to find a clear warrant of law for every such expenditure or disbursement.

The court below found that at the time of the issuance of all the warrants involved in the controversy, except Nos. 2,676 and 2,810, there was indebtedness outstanding against Baker county aggregating \$40,535, evidenced by warrants issued to the following named parties, viz.: May 11, 1885, J. E. Bacon, building bridge, \$3,471; Nov. 25, 1885, Pauley Jail Building Company, jail and cells, \$10,000; Nov. 19, 1885, to Jan. 8, 1887, A. A. Houston, building jail, courthouse, and clerk's office, \$9,844; April 18, 1886, to March 16, 1891, to various persons, bounty on scalps wild animals, \$860; July 20, 1888, J. S. Bingham, premium on insurance, \$200; July 14, 1890, G. D. Barnard & Co., shelving and boxing in vault, \$1,003; Sept. 4, 1890, to March 11, 1891, G. W. Borman, indexing and platting county records, \$6,300; Jan. 16, 1891, to March 11, 1891, E. F. Voight, plat book, \$850; Jan. 16, 1891, to March 11, 1891, C. H. Whitney, experting county books, \$900; March 11, 1891, Union County, bridge contract, \$1,107; July 13, 1889, John Dooley, purchase of toll road, \$1,500; June 10, 1889, S. J. Weatherby, purchase of toll road, \$3,000; June 10, 1889, Wm. Parker, purchase of toll road, \$1,500.

There is a further finding that \$35,000 of this indebtedness was outstanding when warrants Nos. 2,676 and 2,810, above referred to, were issued. It is virtually agreed between counsel that the court's findings in these particulars are practically correct; but the controversy is touching the nature of the indebtedness of the county thus outstanding, whether voluntary or involuntary.

The matter of constructing bridges, building a courthouse and jail, placing shelving and boxing in the vault,

insuring county property, and purchasing toll roads must be conceded to be within the discretion of the county court, as it may make such improvements and incur such expenses or not, as it pleases, regard being had to the constitutional inhibition to the creation of county indebtedness.

The law authorizing the construction and repair of county bridges is carefully drawn, and comports, by intendment, with the exact idea here advanced. Section 4140, Hill's Ann. Laws, reads as follows: "That the county courts of the several counties in this state be and they are hereby authorized to apply in their discretion any moneys in the county treasury not otherwise appropriated towards defraying the expenses of building or repairing bridges on any of the county or state roads within their respective counties."

So, also, is the county court authorized to provide for the erection and repairing of courthouses, jails, and other necessary buildings for the use of the county: Hill's Ann Laws, § 896, subd. 1. But it may exercise a discretion when to build or repair, or whether it will do either. The legislature has not cut short its volition in any particular, as it pertains to the exercise of such authority. Public necessity might demand the erection or repair of such buildings; but the public revenues might inhibit it, and the county authorities, while they have volition in the premises, must pay attention to the revenues as well as the necessities.

In so far as it pertains to insurance on the public buildings and the purchase of toll roads, these are matters which counsel for plaintiff explicitly concede to be within the voluntary exercise of the county's authority. Such is also the case as it concerns bounties on scalps of wild animals. This disposes of all the items of the court's finding except the Borman, Voigt, and Whitney

items, aggregating \$8,050. These we will dispose of later, as a discussion of them will involve the validity of the warrants constituting the subject of controversy.

Now, it is urged by plaintiff, as we have seen, that the cash assets of the county should be first deducted from the voluntary indebtedness, and that the balance remaining will be the measure of the county's voluntary liability under the constitution; and it is claimed that such assets are composed of the following items:

Funds in the county treasury applicable to the payment of county	
warrants	\$ 4,186 44
Estimated unpaid taxes	29,664 32
Delinquent taxes	2,618 00
Total	\$36,469 36

In the discussion of this question it must be borne in mind that the county was indebted, including the voluntary indebtedness thus found to have been incurred, in a sum exceeding \$150,000. In *Fenton v. Blair*, 11 Utah, 78, 39 Pac. 485, SMITH, J., speaking for the court, says: "We agree with counsel for the plaintiff that the allowance of claims against the county equal to the revenues for the current year is not a creation or incurring of any indebtedness or liability. While the taxes for the current year are not collected until the end of the year, they are undoubtedly, after they are levied, regarded as a legal certainty, and are to be treated as if already collected, and allowances may be made against such taxes to the extent of such levy." And in *State v. Hopkins*, 14 Wash. 59 (44 Pac. 134, 550), it was held that the amount of taxes assessed for county purposes upon the tax roll for the current year should be deducted from the outstanding indebtedness to determine its amount, within the meaning of the constitution, limiting the county indebtedness to $1\frac{1}{2}$ per cent. of the value of its taxable property as shown by its previous year's assessment.

The same principle was ruled as respects delinquent taxes appearing upon former rolls. These unpaid taxes were considered and treated as cash assets of the county, and all are to be deducted from the outstanding indebtedness for a correct ascertainment of the county's constitutional liabilities.

In Iowa there was a modification of this doctrine, which is voiced by the decisions in *Grant v. City of Davenport*, 36 Iowa, 396, and *City of Council Bluffs v. Stewart*, 51 Iowa, 358 (1 N. W. 628). In the former it is held that when the contract pertains to the ordinary expenses of the municipality within the limit of the current revenues, and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the incurring of indebtedness, within the meaning of a constitutional provision inhibiting cities from incurring an indebtedness exceeding five per centum of the value of their taxable property. But in the latter case, which involved the issuance of bonds in the promotion of street improvements, it was held that uncollected taxes and the levy for the current year are not to be deducted from the outstanding debt for the purpose of ascertaining the real indebtedness. These cases recognize the authority of the municipalities to anticipate current revenues in the ordinary expenditures incident to the promotion of their purposes, but none other; and they seem more consistent with the policy adopted by this court in considering such ordinary expenses as not within the constitutional inhibition against the accumulation of indebtedness than the other cases cited. But it can make no difference to plaintiff whether we adopt the one position or the other of those courts, or whether we adopt either; for if all the anticipated revenues, including cash in the treasury, should be deducted from the total indebtedness of the county existing at the time

of the issuance of the warrants in controversy, the net indebtedness of the county would still be largely in excess of the \$5,000 limit, as it would be represented by the difference between \$150,000 and \$36,469.36. It is not claimed that any special levy or appropriation of the taxes then unpaid was ever made to meet or defray any part of the expenses or liabilities of the county which these warrants represent; so that they are not payable out of any particular fund, but out of the general fund in the ordinary course.

We take no note under the constitutional limitation of the ordinary expenses of the county, or such as is imposed upon it by law, and which it is powerless to prevent; but the current revenues are levied to meet and dissipate the liabilities incurred thereby, and, while they may be used in the discharge of debts voluntarily incurred, there is a signal vice in the logic which asserts that the entire revenues may be anticipated by expenses of voluntary creation upon the part of the county authorities. Such a proposition would have the effect to augment the constitutional limitation by the amount of the current revenues of a given year and all delinquent taxes standing upon the assessment rolls, and all of voluntary contraction as distinguished from the ordinary expenses in maintaining the county government. Such was clearly not the intendment of the constitution, and, if it speaks solely with reference to voluntary indebtedness, \$5,000 of such must be held to mark the limit, regardless of the status of the levy for current expenses and taxes standing delinquent. We do not mean to say that there might not be a special levy to meet special liabilities about to be incurred, or a setting aside and appropriation of particular or surplus funds to meet such intended liabilities which might not be obnoxious to the constitutional inhibition. No such question is presented here, and hence

we do not pass upon it; but we do hold that unappropriated current revenues, including those past due and uncollected, cannot be anticipated by voluntary indebtedness of the county, especially when the county is otherwise largely indebted for the ordinary current expenses. Such indebtedness must be counted by its exact measure, and, when it aggregates \$5,000, that marks the limit of the county's authority to contract any liability of the nature beyond it: *City of Council Bluffs v. Stewart*, 51 Iowa, 385 (1 N. W. 628). See, also, *Salem Water Co. v. City of Salem*, 5 Or. 29. With this understanding of the constitutional inhibition, we are fully warranted in saying that, when all the warrants in controversy were issued, the county had passed the prescribed limitation of indebtedness.

This brings us back to the question whether all or any of such warrants were issued to cover liabilities not voluntarily incurred, but thrust upon the county by operation of law, for, if so, they are not within the constitutional intendment, and must be considered valid claims against the county, worthy of recognition. What we have said heretofore practically disposes of the Barnard & Co. warrant, No. 3,543, issued for shelving, and the Ferguson warrant, No. 3,646, for insurance, neither of which may be accounted as a liability which the county was powerless to prevent.

With these may be included the Chambers warrants, representing the purchase of a poor farm. Unquestionably this was a matter of purely voluntary inception, as it was entirely discretionary with the county authorities to assume the burdens of the purchase or not, as it was so disposed.

The Borman warrants purport to have been issued for indexing and platting; and it is claimed that such services were authorized and required by the acts creating

and extending to Baker County the office of recorder of conveyances. Borman was the incumbent from July, 1890, to July of 1892. Such acts provide, among other things, that the recorder of conveyances shall keep a general index, both direct and indirect, divided into certain designated heads, also a large, well-bound book, in which shall be platted all maps of towns, villages, or additions to the same within his county, together with the description, acknowledgment, or other writing therein. It is further provided that he shall receive, for his services in recording any conveyance by law authorized to be recorded, the same compensation theretofore allowed the county clerk for similar services, and that he "shall receive from the county for indexing records already made such compensation as the county judge and county commissioner may deem sufficient, and for indexing every tract or lot of land thereafter in the direct or indirect indexes the sum of ten cents for each tract or lot of land, to be paid by the person having the instrument recorded": Hill's Ann. Laws, §§ 2401, 2403, 2405, 2406. Previous to these enactments, there was and had been in vogue for many years a system of recording town plats and indexing records, and apparently the purpose of the legislature was to effect a change in the system in both respects; but, as it regarded plats previously recorded and records previously indexed, the law is directory only, and the counties were accorded a wide discretion when the work of replatting and reindexing should be done, as is evidenced by granting to the county court the power to fix the compensation for the work of reindexing. Nothing is prescribed touching compensation for replatting. The expense incident thereto was not an ordinary one in county affairs, nor was it necessary for the maintenance of the county government in the due and regular exercise of its functions. Hence, we think, the liability

ties incurred for Borman's services in indexing and plating for which these warrants were issued are such as fall within the constitutional inhibition, and therefore not sustainable.

These warrants are void for another reason. When they were issued, it appears that 33 $\frac{1}{3}$ per cent. was added to the accounts presented for services rendered presumably for the purpose of bringing the warrants up to a cash basis in the market. This the county court had no authority to do, as it had the effect to increase the liabilities of the county by the amount of the percentage: *Foster v. Coleman*, 10 Cal. 278.

The warrants issued to C. H. Whitney stand upon a different basis. One witness testifies, in effect, that he was employed to bring the books up to the present time, the books of the former clerk being about one year behind; and another, that he was employed to investigate the books kept by the county officials, to ascertain whether there was any stealing being done. Either service would appear to be necessary to the orderly and prudent management of the business and governmental affairs of the county. It was such a service, so far as we are informed, by the record, as the county could not well dispense with for the time being even, and perform understandingly and intelligently the functions pertaining to its organization. With the reasonableness of the charge or the propriety of incurring the expense we have nothing to do, as they are not made issues in this proceeding. These warrants, aggregating \$475, must therefore be declared valid.

The next question is touching the effect of payment by the lawfully constituted county authorities of outstanding indebtedness, voluntarily incurred, beyond the constitutional limit, with knowledge of their invalidity. We cannot sanction the suggestion that such conduct has es-

topped the county or its taxpayers from asserting the invalidity of others of the same nature still outstanding. The power of ratification, as it extends to such liabilities, does not lie with the county court or any other of the county's agents or officials. "A ratification is," says Mr. Justice FIELD, in *Marsh v. Fulton Co.*, 77 U. S. (10 Wall.), 676, "in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally." See, also, *Loan Association v. Topeka*, 87 U. S. (20 Wall. 655); *Daviess Co. v. Dickinson*, 117 U. S. 657 (6 Sup. Ct. 897); *Norton v. Shelby Co.*, 118 U. S. 425, 451 (6 Sup. Ct. 1121). The logic is conclusive against plaintiff's position.

Having received the benefits, is the county precluded from asserting the invalidity of the warrants issued in consideration thereof? It is tersely, but pointedly, stated, in 7 Am. & Eng. Enc. Law (2d ed.) 930, that, "when the constitutional limit has been reached, the county has no further capacity to make contracts out of which additional burdens may arise. As to such contracts it may be said that the county has no existence, and the disability extends to all forms of action, whether by parol, by deed, by confession of judgment, or any other device." When the constitutional limit has been reached, all acts of a voluntary nature involving the county with liabilities are *ultra vires*. All authority of binding force absolutely ceases, and the county cannot be mulcted with indebtedness either by direction or indirection, so that a receipt of benefits does not raise even an implied liability. The principle involved is discussed in *City of Portland v. Bituminous Pav. Co.*, 33 Or. 307 (52 Pac. 28), recently decided. See, also, *Sutro v. Pettit*, 74 Cal. 332 (5 Am.

St. Rep. 442, 16 Pac. 7) ; 1 Dillon, Mun. Corp. (4th ed), §§ 457, 458, 504, 935. The estoppel extends to matters involving informalities and irregularities in the observance of law, but never to matters entirely beyond the scope of constitutional authority.

Neither was the recognition of these warrants as a part of the indebtedness of Baker County, by the commission appointed to apportion such indebtedness between the counties of Baker and Malheur, such an act as will estop the county or its taxpayers to assert their invalidity. The commission was certainly clothed with no higher authority than the county court, if, indeed, it possessed any authority of a similar nature. But no such question as the unconstitutionality of the issuance of the warrants in controversy was made or determined before or by the commission, and it could have no binding effect as *res adjudicata*, if it was conceded that the requisite privity existed between the parties concerned. The decree will be that the Whitney warrants be restored to their original condition, but that plaintiff be perpetually enjoined from enforcing payment of all the other warrants involved in this suit.

MODIFIED.

Decided at PENDLETON, 18 August, 1886.

CONKLIN v. LA DOW.

[54 Pac. 216]

MORTGAGE FORECLOSURE—PARAMOUNT TITLE.—The rule that a title adverse or paramount to that of the mortgagor cannot be litigated in a foreclosure suit does not apply to a suit to foreclose a mortgage on land of an infant executed by a third person to whom the land was afterwards conveyed in pursuance of a scheme to encumber the infant's property.

INFANTS—JUDGMENTS—COLLATERAL ATTACK.—Fictitious proceedings in the county court by which the land of an infant is transferred to a third person who had previously executed a mortgage thereon in pursuance of a scheme to mortgage the infant's land are not entitled to the force and effect of a judgment, and may be collaterally attacked in a suit to foreclose the mortgage.

GUARDIAN AND WARD—MORTGAGE.—A guardian who has no power under the statute to mortgage the land of his ward cannot indirectly encumber it by making a sham sale to a third party who executed a mortgage thereon.

MORTGAGE FORECLOSURE—EQUITY MAXIM.*—Under the rule that he who comes into a court of equity must come with clean hands, the fact that a mortgage on a minor's interest in a tract of land is void against him because made without authority by a guardian does not deprive the mortgagee of all rights, but only of any lien on the interest of the infant. The other mortgagors and subsequent purchasers must pay or take the consequences.

From Umatilla : STEPHEN A. LOWELL, Judge.

This is a suit by S. L. Conklin of New York to foreclose a mortgage on certain real property in Pendleton, executed by Mattie La Dow, Charles B. Isaac, and Frank E. La Dow, to plaintiff's assignor, to secure the payment of \$17,350. Lewis McArthur La Dow and Letitia Lombard were, with other parties, made defendants, under the usual allegation that they had or claimed some interest in or lien upon the mortgaged premises, but that such interest, claim or lien is subsequent to and subject to plaintiff's mortgage. The defendants last named answer separately, and upon the questions arising on their answers the case is here for trial.

Lewis McArthur La Dow admits by his answer the execution of the mortgage in manner and form as alleged in the complaint, but, as a defense to its foreclosure as against him, avers that on November 5, 1876, his father, George A. La Dow, died seised and possessed of the mortgaged premises, leaving, surviving him, his widow, the defendant Mattie A. La Dow, and his two sons, the defendant Frank E. La Dow and the answering defendant; that, by reason thereof, he and his brother became the owners in fee of the property described in the mortgage, subject to the dower of their mother; that such property was, at the time, free from all liens and incum-

*NOTE.—A number of authorities showing different applications of this maxim are collected in notes in 3 L. R. A. 368, and 11 L. R. A. 458.—REPORTER.

brances, and continued so to be until September 1, 1889, when the mortgage in suit was given thereon; that, at the time of its execution, he was a minor, of about the age of fifteen years, but that the defendant Mattie A. La Dow, who was his regularly appointed and acting guardian, being desirous of mortgaging his interest in the premises described in the complaint for the purpose of obtaining money thereon, entered into an agreement with the Jarvis-Conklin Mortgage Trust Company, the plaintiff's assignor, which was desirous of making such loan, that it should be effected by means of a pretended guardian's sale of the property to the defendant Charles B. Isaac; that, pursuant to such arrangement, his guardian filed a petition in the County Court of Umatilla County on September 12, 1889, for an order of sale of the defendant's interest in the mortgaged premises, which in due time was granted; that on November 14, 1889, by virtue of such pretended order, a sale was made to the defendant Charles B. Isaac, which was subsequently confirmed, and on January 11, 1890, a guardian's deed was executed to him; that Isaac did not pay anything for the property, but the entire proceedings were had, and the pretended sale and conveyance made and accepted, for the sole purpose of enabling him to mortgage the defendant's interest in the property to the Jarvis-Conklin Mortgage Trust Company, which had full knowledge and notice, through its agents, of all the proceedings therein, and of the objects and purposes to be accomplished thereby; that, in fact, the mortgage was executed by Isaac, and delivered to the trust company some days before the petition of the guardian for an order of sale was filed in the county court, and several months before the guardian's deed was executed. It is then averred that the entire proceedings in the county court, and the sale and conveyance to Isaac, and his

execution of the mortgage to the trust company, were and are void and of no effect as against defendant, and that the plaintiff purchased the note and mortgage after its maturity, with full knowledge of all the proceedings in the county court, and of the manner in which Isaac pretended to acquire title to the mortgaged premises.

A motion was made to strike out the affirmative matter in the answer, for the reason that it is an attempt to try in a foreclosure proceeding the validity of a title adverse and paramount to that of the mortgagor, and also because it is an attempt to attack collaterally the proceedings of the county court in the matter of the sale of a minor's property. This motion being overruled, the plaintiff asked permission to dismiss as to Lewis McArthur La Dow, so as to avoid trying any question of title in this suit; but this was likewise denied, and he thereupon filed a reply denying the material allegations of the answer, except the fact that the proceedings for the sale of the defendant's interest in the mortgaged property were in fact had.

The defendant Letitia Lombard, by her answer, denied that the plaintiff's mortgage is valid, or that her claim is inferior thereto, and then averred as a defense, in substance, that in September, 1889, the real property described in the complaint belonged to Frank E. La Dow and Lewis McArthur La Dow, who was a minor; that Mattie La Dow was his qualified and legally appointed guardian, and that the Jarvis-Conklin Trust Company, being desirous of loaning money on said property, entered into a conspiracy with Frank E. La Dow and the guardian of the defendant Lewis McArthur La Dow and one Isaac to have a pretended probate sale made of the interest of the minor, and thus vest the apparent legal title in Isaac; that thereupon, and without waiting for the probate proceedings, Frank E. La Dow, Mattie La

Dow, and Isaac executed and delivered the note and mortgage sued upon, with covenants in fee and general warranty; that, in pursuance of such conspiracy, Mattie La Dow applied to the county court for permission to sell the interest of her ward in the real property, alleging that it was necessary for his support; that such proceedings, apparently regular on their face, were had therein that the land was, on November 14, 1889, apparently sold to Charles B. Isaac for \$15,000, which sale was regularly confirmed, and a guardian's deed executed and delivered to the pretended purchaser. It is then alleged that the whole proceeding in the county court was a fraud; that Isaac never intended to, and never did, pay anything for the property, but that it was a scheme to enable the trust company to secure a mortgage thereon; and that such company took the mortgage with a full understanding that the fraudulent probate sale should be carried through, and that no one but Isaac should be permitted to bid thereat; and that it connived at and assisted in the scheme to indirectly mortgage the interest of the minor, because the same could not be done under his name. It is then further averred that Mrs. Lombard has since the execution of the mortgage become the owner by purchase of a part of the premises described therein, and she therefore prays that the entire mortgage be declared void and be cancelled as to her. A motion to strike her answer from the files being overruled, a reply was filed, denying the affirmative matter alleged therein.

Upon the issues made by these answers and the replies thereto the cause was tried, and resulted in a decree to the effect that the plaintiff should recover from the defendants Mattie A. La Dow, Frank E. La Dow, and Charles B. Isaac the sum of \$20,612.55, the further sum of \$800 attorney's fees, and his costs and disbursements;

that the plaintiff's mortgage is a first lien upon the mortgaged premises, and prior to any liens or claims of the defendants, or any of them, except the defendant Lewis McArthur La Low, and as to him it is void and of no effect. From this decree the plaintiff and the defendant Letitia Lombard both appeal.

AFFIRMED.

For appellant Conklin there was a brief and an oral argument by *Messrs. Geo. W. Hazen and Robert G. Morrow*.

For appellant Lombard there was a brief over the names of *Benjamin M. Lombard, Seneca Smith and Frank M. Wells*.

For respondent L. M. La Dow there was a brief and an oral argument by *Mr. John J. Balleray*.

MR. JUSTICE BEAN, after making the foregoing statement of facts, delivered the opinion of the court.

Upon the facts, the case is clearly and unmistakably with the defendant Lewis McArthur La Dow. There is no pretense that the proceedings in the county court were instituted or conducted for the purpose of actually selling his interest in the premises described in the mortgage, or that Isaac, the pretended purchaser, ever paid a dollar therefor. It is undisputed that their sole purpose was to facilitate the mortgaging of the minor's interest, and to evade the rule prevailing in this state that a guardian cannot execute a mortgage on the real estate of his ward: *Trutch v. Bunnell*, 11 Or. 58, 61 (4 Pac. 588). The attorney who conducted the proceedings says that their purpose was "to remove any question as to the right to mortgage the minor's interest. It was not a de-

vice or scheme which I suggested, but one which was suggested to me either by Dr. La Dow, by Sharon, or his partner, or by some correspondence with the agent of the Jarvis-Conklin Mortgage Trust Company, or with some attorney of the company"; and that he did not know whether Isaac, when he bought in the property at the guardian's sale or afterwards, paid the purchase price. "My recollection is that he either gave his note for the amount, or made some arrangement with some bank to let him have the money; but it was understood that whatever he paid should be repaid by a transfer of the property back to the minor, or to someone else, after the mortgage was placed on it. The understanding which I had about the matter, and which I gathered either from conversations with Dr. La Dow or Mr. Isaac, or both, was that either the money should be paid in, or Isaac should give his note for that amount, and that, after the mortgage had been placed on the property, such money should be returned to Isaac if he had paid it, or, if he did not pay it, his note should be cancelled and returned to him, upon his executing a deed either to Lewis McArthur La Dow, or to someone else for the property, which he bid in at the sale. No, I am not sure that he ever executed any note at all."

In brief, the facts of the transaction are that Frank E. La Dow and the guardian of Lewis McArthur La Dow, being of the opinion that it would be for the interest of the owners of the property, including the minor, to mortgage the same for money with which to construct a brick block thereon, applied through their agent, Dr. La Dow, to, and obtained from, the Jarvis-Conklin Mortgage Trust Company, a loan for that purpose; but as the interest of the minor could not be mortgaged either by himself or his guardian, and as it was desirable to begin work on the building immediately, it was arranged

that the note and mortgage should be executed by Frank E. La Dow, Mrs. La Dow, and one C. B. Isaac, a brother of Mrs. La Dow, the money advanced as the building progressed, and that such proceedings should thereafter be had in the county court as might be necessary to vest Isaac with the legal title to the minor's interest, and thus make the mortgage good under the warranty clause therein. In pursuance of this arrangement, the mortgage was executed and recorded; and Isaac gave to the trust company a bond in the penal sum of \$16,000, reciting the fact that the title to a portion of the mortgaged premises had not been perfected in him, and conditioned that if it should be perfected to the satisfaction of the attorneys of the company on or before the 15th of January, 1890, and such mortgage should become a first lien upon the property therein described, the bond should be void, otherwise to remain in full force and effect. The money was thereupon advanced by the mortgage company as needed in the construction of the building, and the proceedings set out in the answer subsequently had.

It was suggested at the argument that there was no evidence that the trust company had knowledge of the character of the proceedings, or of the purpose to be accomplished thereby; but this contention is so much at variance with the entire circumstances of the case, as well as with the positive testimony of the witnesses, that it is scarcely entitled to serious consideration. The evidence is undisputed that the company made a loan to the defendant's guardian, and, as security therefor, received and accepted a mortgage on his property given by a party who had no right or title thereto, under an agreement that he should subsequently acquire the title by means of a proceeding in the county court. This is of itself sufficient to indicate quite conclusively that the company had knowledge, through its agents, of the char-

acter of such proceedings, and of the purpose to be accomplished thereby. But, besides this, Messrs. Marston & Sharon, who were the local agents of the mortgage company at Pendleton, and through whom the loan was made, both testify that they and the general agent of the company at Portland had full knowledge of the whole transaction. Mr. Sharon, who seems to have had the matter of this particular loan in charge, testifies that, "in order to enable the property to be mortgaged, we had proceedings in the county court to dispose of the minor's interest. The object of the proceedings in the county court was to dispose of the minor's interest, and get it into the hands of some person competent to sign a mortgage, and we got the property into the hands of Charles B. Isaac." He further says that he advised the general agent of the company at Portland, to whom all applications for loans and abstracts of title were forwarded, that Lewis McArthur La Dow was a minor, and that whatever was subsequently done in attempting to divest him of his title was by the direction and with the full knowledge of such agent; and the attorney who appeared for the guardian says of the proceedings in the county court: "I understood it was a condition which the party advancing the money required. Yes, a condition which they required before they would make the loan."

Nor is there any merit in the contention that the plaintiff in this suit is entitled to any special consideration on the ground that he is a *bona fide* purchaser of the note and mortgage for value. The evidence shows that he was an officer of the trust company at the time the note and mortgage in question were executed; that it was past due when assigned and transferred to him; and there is no evidence that he ever paid anything therefor.

Indeed, it is practically admitted by plaintiff's counsel

in their brief that the questions involved on this appeal are of law, and not of fact, for they state the grounds of their appeal as follows: "(1) The court should not have attempted to determine in this foreclosure suit the question of a paramount title in Louis McArthur La Dow. When this title appeared in the case, plaintiff not only moved to strike it out, but asked permission to amend the complaint so as to avoid this question; and it was error to refuse this motion. (2) The guardian's sale is sufficient, regardless of whether or not there was a conspiracy to mortgage the minor's interest, since the entire record shows that it was necessary to sell this land for the support of Lewis McArthur La Dow. (3) The answers both of Lewis McArthur La Dow and Letitia Lombard are a collateral attack on the final judgment of the probate court, and should have been stricken out, inasmuch as they and the testimony supporting them do not constitute a defense."

In support of the first point, counsel rely upon the familiar rule that a title adverse or paramount to that of the mortgagor cannot be litigated in a foreclosure suit. That doctrine has no application to this case. No question of paramount title is involved in the defense of Lewis McArthur La Dow. His defense is that, at the time of the execution of the mortgage, he was, and is now, the owner of the undivided half of the property described therein, and that the whole proceedings leading up to its execution, including those in the county court, were simply a scheme to incumber his property. His claim is not adverse to that of the mortgagor, for Isaac did not in fact pretend to have any title to the mortgaged premises. He was simply claiming to act as the representative of the defendant, and as an instrument for effecting a mortgage upon his property. When he executed the mortgage he did not design to incumber his

own property, but that of the contesting defendant. The defense made grows out of the very contract and transaction which form the basis of plaintiff's suit; and Lewis McArthur La Dow, whose property is sought to be bound by the mortgage, has just as much right to have its validity litigated and determined in this suit as he would have if it had been executed directly by his guardian or by any other person assuming to act for him. The fact that an attempt was made to cover up the real transaction under the forms of law can in no way lessen his rights in the premises. If the proceedings in the county court had been for the purpose of actually selling his interest in the land, a question as to their validity or invalidity could not be tried in this suit. But they were admittedly not for that purpose, but were adopted as a means of effecting a mortgage upon his property; and it is eminently proper that the validity of such mortgage should be tried in a suit for its foreclosure. The proceedings of the county court are regular, and on their face vest a perfect title in Isaac, the mortgagor. A decree of foreclosure and sale to some innocent purchaser, who might buy relying on the record, would therefore, at least, serve to further complicate matters, if not actually deprive defendant of his title. The record and evidence show that the mortgage was intended and designed to be a lien upon the property of the answering defendant; and, in our opinion, he has a right to contest its validity in this suit, and the court committed no error either in overruling the demurrer to his answer or in refusing to allow the plaintiff to dismiss as to him.

It is next claimed that this is a collateral attack upon the judgment and proceedings of the county court, for fraud, and for that reason must fail. But, as between the plaintiff and the defendant Lewis McArthur La Dow, these proceedings are not entitled to the force and effect

of the dignity of a judgment. They were purely fictitious, instituted for the purpose of evading a wholesome rule of law, were a fraud upon the court, and cannot therefore be treated as a judicial proceeding. According to the statement made by Solicitor General Wedderburn in his argument in *Duchess of Kingston's Case*, 20 How. St. Trials, 355, 478, and adopted by Lord Brougham in the subsequent case of *Earl of Bandon v. Becher*, 3 Clark & F. *479, *510, a judgment "is not an instrument with a bit of wax and the seal of the court put to it. It is not an instrument with the signature of a person calling himself a register. It is not such a quantity of ink bestowed upon such a quantity of stamped paper. A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled. In order to make a sentence, there must be a real interest, a real argument, a real prosecution, a real defense, a real decision. Of all these requisites, not one takes place in case of a fraudulent and collusive suit. There is no judge. But a person, invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him. There is no party litigating; there is no party defendant; no real interest brought into question." And so Lord Brougham himself said in *Shedden v. Patrick*, 1 Macq. 619, 10 Chi. Leg. News, 234: "If it be proved that there has not been a real suit instituted and appealed, but that there was a collusion and fraud between the parties; that there was no real plaintiff and real defendant in real conflict together, upon whose case the court below and this house had adjudicated; if it appear that there was no real trial, no real proceeding, and consequently no real judgment, but that the court was imposed upon by the fraud of the parties; that the court was led to believe that there was a contest when there was none; and that there was an

opposition of parties when they were really in concert, and leagued for the purpose of deceiving the court to serve their own ends,—then, my lords, I say I am prepared to go to the full length of holding that in this house, as in every other court, a proceeding so instituted, so carried on, and so consummated in a judgment thus fraudulently and collusively obtained—in a word, a fictitious judgment—may be treated as a nullity.”

The case before us falls within the principle thus stated by Mr. Wedderburn and Lord Brougham. The proceedings in the county court were purely fictitious, gotten up, not for the purpose of obtaining any real decree or order of such court for the sale of the property belonging to the contesting defendant, but to facilitate the accomplishment of an entirely distinct and separate purpose. It was not intended that any questions should be submitted to the court for adjudication, or that it should perform any office in the matter except to approve in a formal way what the parties had already agreed upon. The whole scheme was a pure fiction, by which the court was led to believe that it was adjudicating and determining real questions, properly within its jurisdiction, when in fact the parties had themselves settled and agreed upon just what should be done, and had no intention whatever to abide by or be governed by its decree or order. The machinery of the court was simply used by them to cover up the real truth, and to accomplish something entirely different from what the proceedings on their face purported to be. It would be an anomalous doctrine if, in a suit to foreclose a mortgage upon the property of a minor, he could not question its validity, because, in order to facilitate its execution, resort had been had to a pretended sale of his interest to the ostensible mortgagor, under some fictitious proceedings of the county court.

But it is said that the minor himself was a party to such proceedings, and is therefore bound by the decree and orders of the court. It is true that it has been held in some instances that a minor is a party to a proceeding for the sale of his property instituted by his guardian, in the sense that he is not required to be served with notice thereof; but we think it may be safely asserted that no court has ever gone to the extent of holding that he cannot question such proceedings in a suit of this kind, when they were fictitious, and instituted for the purpose of avoiding a rule of law designed for his protection.

We conclude, therefore, that as between the plaintiff and the contesting defendant, Lewis McArthur La Dow, the proceedings of the county court are an absolute nullity, and the mortgage in question is void. In coming to this conclusion we do not desire to be understood as intimating that there was any actual fraud intended. It is no doubt true, and the evidence shows, that all the parties acted in the utmost good faith, believing that it would be for the best interests of the minor to mortgage his property to secure funds with which to improve the same. But that fact does not help the matter, or tend in any way to give validity to the proceedings of the county court or the mortgage sought to be foreclosed: *Batts v. Winstead*, 77 N. C. 238. Under the laws of this state, a guardian cannot mortgage the real estate of his ward; and what he is prohibited from doing directly he certainly cannot do indirectly, by means of a sham sale to some third person: *Ferry v. Laible*, 31 N. J. Eq. 566.

The defendant Lombard claims to have purchased in good faith a portion of the mortgaged premises from the successor in interest of Isaac, after the execution and recording of the mortgage in question, and after the termination of the proceedings in the county court; and

she claims that the mortgage sought to be foreclosed was so tainted with fraud in its inception that the plaintiff does not come into court with clean hands, and therefore a court of equity cannot afford him any relief, even a decree foreclosing the mortgage as against the interests of Frank E. La Dow and Mrs. La Dow. But we cannot concur in this view. There was in fact no actual fraud in the transaction. The note and mortgage represent a loan of money made by the mortgage company. The fact that the scheme which was adopted to secure the mortgage on the minor's interest was ineffectual to accomplish that purpose as against him ought not, it seems to us, to deprive the plaintiff of the right to foreclose as against the other parties to the mortgage; and especially so since the question as to whether Mrs. Lombard did not obtain a perfect title, on the ground that the proceedings of the county court, being regular and valid on their face, import absolute verity in favor of a subsequent innocent purchaser for value, is not involved in this case, and could not be tried therein. It follows from what has been said that the decree of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Decided at PENDLETON, 18 August, 1896.

McALISTER v. LONG.

[54 Pac. 194]

SUFFICIENCY OF EXCEPTIONS.—An exception in gross to a series of propositions, some of which are correct, is unavailing on appeal: *Langford v. Jones*, 18 Or. 307; *Salomon v. Cress*, 22 Or. 177; *Jensen v. Foss*, 24 Or. 158, and *Nickum v. Gaston*, 24 Or. 380, approved and followed.

From Grant: MORTON D. CLIFFORD, Judge.

Action by J. J. McAlister against John Long, who had judgment, whereupon plaintiff appealed.

AFFIRMED.

Mr. Jas. A. Fee for appellant.

Mr. Chas. W. Parrish for respondent.

MR. JUSTICE BEAN delivered the opinion.

This is an appeal from a judgment in favor of the defendant in an action brought to recover damages for an injury to the plaintiff received by falling into an excavation made by the defendant along or near what is alleged to be a public highway, and which it is claimed was carelessly and negligently left without light or guard to protect the public from falling into it. The only alleged error is an instruction to the effect that before the jury could find for the plaintiff they must be satisfied that the road in question was used by the public as a highway for a period of twenty years prior to 1881, the time the excavation was made. But no sufficient exception was saved to the giving of this instruction to bring it before us for review. The bill of exceptions contains the entire charge of the court, appended to which is a statement that: "Counsel for plaintiff here excepts to that portion of the charge commencing with the charge in relation to the 'right of a party to dig any pit or excavation on his own land, provided he does not so dig within the limits of a road'; and from and after said portion down to that portion of the charge commencing with, that 'plaintiff is only entitled to exercise ordinary diligence'; and also that portion of the charge commencing, 'If you find from the evidence that, taking into consideration the darkness of the night that plaintiff was wandering,' down to and including that portion of the charge to the effect that 'notice to the defendant of any gap or defect in the fence should be proved'—which was all done prior to the jury retiring from the box." It is difficult, if not impossible,

to determine from this language whether the portion of the charge complained of is embraced within the exception; but, if so, it is only one of a series of instructions containing separate and distinct propositions, some of which are admittedly sound, and the exception is therefore unavailing. An exception to a charge must point out distinctly the particular portion to which it is directed, and an exception in gross to a series of propositions, as in this case, is ineffectual, if any one of them is correct. This doctrine was early announced in this state by Mr. Justice SHATTUCK in *Murray v. Murray*, 6 Or. 17, has been repeatedly followed, and is a correct rule of practice: 8 Enc. Pl. & Prac. 259; *Langford v. Jones*, 18 Or. 307 (22 Pac. 1064); *Salomon v. Cress*, 22 Or. 177 (29 Pac. 439); *Jensen v. Foss*, 24 Or. 158 (33 Pac. 535); *Nickum v. Gaston*, 24 Or. 380 (33 Pac. 671, and 35 Pac. 31). It follows that the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Decided at PENDLETON, 13 August, 1898.

HAMILTON v. BUTLER.

[54 Pac. 200]

88	370
136	189

SUFFICIENCY OF NOTICE OF APPEAL.—A notice of appeal which describes the judgment appealed from no further than that it was entered against appellant in an action between certain parties in a certain court on a certain day is not sufficient. *Crawford v. Wist*, 28 Or. 506, applied.

From Baker: ROBERT EAKIN, Judge.

Action by Andrew Hamilton against E. B. Butler and Robert Dickson. Judgment for plaintiff, from which defendants appeal.

AFFIRMED.

For appellants there was a brief over the name of *Hyde & Packwood*.

For respondent there was a brief over the name of *Lawrence & Manville*, with an oral argument by *Mr. J. Lawrence*.

PER CURIAM. Judgment was rendered in the above-entitled action in the County Court of Baker County, in favor of plaintiff, and against defendants, for the sum of \$191 and costs and disbursements, taxed at \$18.60, on the 4th day of February, 1898. From this judgment defendants attempted to appeal to the circuit court by serving a notice which, omitting the title of the cause, is in words and figures as follows: "You will please take notice that defendants Butler & Dickson, co-partners above named, in the above-entitled action, hereby appeal to the circuit court of this state for Baker County from the judgment therein made and entered in said action and county court on the 5th day of February, A. D. 1898, in favor of the plaintiff in said action, and against said defendants, and from the whole thereof, for the reason that said judgment was and is contrary to law and the evidence introduced in said action." The circuit court dismissed the appeal because the notice was deemed insufficient under the practice, and the correctness of that ruling is challenged by the appeal to this court. If it be conceded that the date of the supposed judgment as given in the notice is a clerical misprision,—a matter which we are unable to determine from the record, as the date in the undertaking on appeal corresponds with it, while that contained in the transcript of judgment shows it to have been rendered a day earlier, yet within the case of *Crawford v. Wist*, 26 Or. 596 (39 Pac. 218) the notice is otherwise clearly insufficient, and that case is decisive of the present controversy.

AFFIRMED.

Decided August 15, 1896.

BLANK v. WALKER.

[53 Pac. 1133]

RULES OF COURT—DISMISSING APPEAL.—Where there has been notable delay in filing briefs beyond the time limited by the rules, and no satisfactory explanation thereof is given, the case will be dismissed: *Reynolds v. Jackson County*, 33 Or. post, applied.

From Washington : THOS. A. McBRIDE, Judge.

Action by Stephen Blank against L. C. Walker and others, wherein plaintiff appealed. Respondent moves to dismiss for failure to file briefs as required.

DISMISSED.

Mr. S. B. Huston for the motion.

Mr. E. B. Tongue, contra.

PER CURIAM. This is a motion to dismiss the appeal for the reason that the appellant has failed to serve and file his brief within twenty days after serving the abstract of the record as required by Rule 6. The abstract was served about November 11, 1897, but no attempt was made to obtain an extension of time or to be relieved of the default until June 24, 1898, more than seven months thereafter, and the reasons advanced being insufficient to excuse the delay and consequent default, upon the authority of *Reynolds v. Jackson County*, 33 Or. post, (53 Pac. 1072), the motion will be allowed and the appeal dismissed.

DISMISSED.

Decided at PENDLETON, August 13, 1898.

SCHULTZ v. LEVY.

[54 Pac. 184]

HOMESTEAD ON PUBLIC LAND—CONCLUSIVENESS OF JUDGMENT.—One who has acquired land as a homesteader under Rev. Stat. U. S., § 2296, may recover possession of the land from one who purchased at a sale under an execution on a judgment based on a debt contracted prior to the actual issuing of the patent although evidenced by a note executed after its issuance: *Wallowa Nat. Bank v. Riley*, 29 Or. 289, and *Berry v. Charlton*, 10 Or. 362, followed.

From Wallowa: ROBERT EAKIN, Judge.

Action of ejectment by J. M. Schultz against A. Levy, in which plaintiff had judgment.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. J. F. Baker*.

For respondent there was a brief and an oral argument by *Mr. A. C. Smith*.

MR. JUSTICE BEAN delivered the opinion.

This is an action to recover possession of real property. The plaintiff settled upon and acquired title to the land in controversy under the homestead laws of the United States, and received his patent therefor in July, 1891. Prior thereto, to wit, on the — day of September, 1889, he executed his note to the Island City Mercantile & Milling Company for the amount of a debt then due from him to the company, which note he renewed in 1892, and in November, 1893, the milling company commenced an action thereon, and caused the real property in question to be attached. Judgment and an order for the sale of the attached property was rendered in such action, and the property sold to the defendant under an execu-

tion issued thereon. The sale was thereafter duly confirmed, and a sheriff's deed issued, and the defendant, by the aid of a writ of assistance, put into possession of the premises; whereupon plaintiff commenced this action, and bases his right to recover on the ground that the sale to the defendant was void because it was made under a judgment rendered for a debt contracted prior to the issuing of the patent.

It is settled law in this state that land acquired by a homesteader, under section 2296 of the Revised Statutes of the United States, is not liable to the satisfaction of any debt contracted prior to the actual issuing of the patent therefor, and the fact that such debt may be evidenced by a promissory note executed after that time is of no consequence in determining the liability of the land to seizure and sale. *Wallowa Nat. Bank v. Riley*, 29 Or. 289 (54 Am. St. Rep. 794, 45 Pac. 766). Counsel for the defendant does not question this rule, but he contends that the judgment and order for the sale of attached property in the action of the milling company against the plaintiff is a conclusive adjudication that the property was not exempt from seizure and sale, and is a bar to this action. But it is held in *Berry v. Charlton*, 10 Or. 362, that such an order is no bar to an action by the defendant in the writ to recover possession of attached property on the ground that it is exempt from execution, and this decision is conclusive of the question here presented.

It is said in the brief that the plaintiff appeared in the action brought against him by the milling company, and moved to dissolve the attachment, on the ground that the property was exempt from seizure, and such issue was decided against him, and hence it is contended that the question must be regarded in this action as *res adjudicata*. The record does not support this statement, but, if it

did, it may well be doubted whether, under our statute, such a question can be thus tried. See *Bank of Winne-mucca v. Mullaney*, 29 Or. 268, 45 Pac. 796. There is no error in the record.

AFFIRMED.

Decided at PENDLETON, 13 August, 1898.

BARR v. RADER.

[54 Pac. 210]

WHEN NONSUIT SHOULD BE REFUSED.—The only question for the consideration of the court on a motion for nonsuit is whether there is any evidence from which the jury can reasonably conclude that the facts sought to be proved are established, and in determining such question it must assume as true every fact which the jury could properly find from the evidence: *Wallace v. Suburban Railway Co.*, 28 Or. 174, and *Vanbibber v. Plunkett*, 28 Or. 562, approved.

EXECUTION—PAYMENT.—It is immaterial that an execution debtor does not offer an account as part payment of the execution, if it is taken and accepted by the creditor from the sheriff as such payment, and the debtor subsequently acquiesces therein.

From Grant: MORTON D. CLIFFORD, Judge.

Action for damages by Emmet Barr against George Rader. Judgment for plaintiff and defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Lucian Everts*, with an oral argument by *Messrs. Chas. W. Parrish* and *L. Kearney*.

For respondent there was a brief over the names of *Thornton Williams*, *Jas. A. Fee* and *Thos. G. Hailey*, with an oral argument by *Mr. Fee*.

MR. JUSTICE BEAN delivered the opinion.

This action is to recover damages for the seizure, detention, and sale of certain personal property under an

33	375
37	77
37	454
38	375
40	278
33	375
46	242

execution issued at the instigation of the defendant on a judgment which it is alleged had been paid, and is here for the third time on appeal. The decisions in the two former appeals are to be found reported in 29 Or. 399 (45 Pac. 776), and 31 Or. 225 (49 Pac. 962), from which it appears that the only issue of fact in the case is whether the defendant accepted as part payment of an execution previously issued on the judgment in question an account in favor of plaintiff against Harrer Brothers, levied upon under such execution. At the trial, the proceedings of which are here for review, after the plaintiff had submitted his evidence in chief, the defendant moved for a nonsuit on the ground that he had failed to prove a cause sufficient to be submitted to the jury. This motion was overruled, and, the trial resulting in a verdict and judgment in favor of plaintiff, the defendant appeals, assigning as error the overruling of his motion for a nonsuit, and in refusing to give certain instructions requested by him.

The motion for a nonsuit ought not to prevail, unless the evidence for the plaintiff, taken in its most favorable light, and giving him the benefit of every fair and legitimate inference properly deducible therefrom, would not authorize the jury in finding in his favor, or, if they did, would require the court to set aside their verdict for want of evidence to support it. *Wallace v. Railway Co.*, 26 Or. 174 (25 L. R. A. 663, 37 Pac. 477); *Vanbibber v. Plunkett*, 26 Or. 562 (27 L. R. A. 811, 38 Pac. 707); *Herbert v. Dufur*, 23 Or. 462 (32 Pac. 302). On a motion for a nonsuit for insufficiency of evidence the court cannot weigh the testimony, or determine its sufficiency. The only question for its consideration is whether there is any evidence from which the jury can reasonably conclude that the facts sought to be proved are established. And in determining that question it must assume as true

every fact which a jury could properly find from the evidence, and give to the plaintiff every intendment and legitimate inference which can arise therefrom.

It may be admitted that the evidence tending to show that the defendant accepted the Harrer Brothers' account as a part payment on the first execution is very slight, but yet there is some evidence to that effect, and its sufficiency was for the jury and not the court. There is evidence that the contract between the plaintiff and Harrer Brothers, under which their indebtedness to him arose, was not consummated until after the issuance of the first execution, and was then completed with the understanding and agreement that the amount to become due thereon should be seized under such execution, and paid to the defendant; and the plaintiff testifies that it was his understanding that this account, which was not due for some six months after the garnishment, was received and accepted by the defendant as a part payment on the execution, and with this understanding he subsequently paid the balance due thereon in coin to the deputy sheriff, and got a receipt from him in full. The deputy sheriff who served the writ says that he acted under the express direction of the defendant, and when he took Harrer Brothers' answer to him he accepted the garnishment, and said he did not want any other property levied on, but was satisfied with what he had; that, acting on the understanding derived from his conference with the defendant, he regarded the account with Harrer Brothers as a part payment on the execution, and collected the balance due thereon from the plaintiff, giving him a receipt in full, and thereupon returned the execution. This evidence, corroborated as it is by the conduct of the parties and other circumstances, was sufficient to entitle the plaintiff to go to the jury on the question as to whether the defendant accepted the account against

Harrer Brothers as part payment on the execution, and therefore the motion for a nonsuit was properly overruled.

It is claimed that the court erred in refusing to instruct the jury that, in order to prove that the defendant "accepted the garnishment in question, it is necessary for the plaintiff to show that either he or his agent offered the garnishment to Rader as a part payment of the amount specified in the execution." But we are of the opinion that this proposed instruction was properly refused. It is immaterial whether there was any offer by plaintiff of the account against Harrer Brothers as part payment on the execution, if it was taken and accepted by the defendant from the sheriff as such payment, and the plaintiff subsequently acquiesced therein.

It is also claimed that the court erred in refusing to instruct the jury that the attorney for the defendant had no power, by virtue of his general retainer, to accept anything but money in payment of the execution, and that the receipt may be contradicted or explained by parol. But neither of the instructions was germane to any issue in the case. No claim was made that the agreement for the acceptance of the account as a payment on the execution was made with anyone but the defendant himself, or that the receipt given by the sheriff to the plaintiff was binding on the defendant. There being no error in the record, the judgment is affirmed.

AFFIRMED.

Decided at PENDLETON, 13 August, 1898.

SMITH v. TURNER.

[54 Pac. 166]

INTEREST ON UNLIQUIDATED CLAIMS.—Under the Oregon statute (Hill's Ann. Laws, § 3587*) there is no interest on unliquidated claims: *Hawley v. Dawson*, 16 Or. 344, and *Pengra v. Wheeler*, 24 Or. 532, followed.

COUNTERCLAIM—INTEREST.—A counterclaim for unliquidated damages in an action on a note does not cut off the running of interest on the note from the time the claim accrued, but only from the verdict, except where the damages are previously liquidated by the confession or default of plaintiff.

From Harney : MORTON D. CLIFFORD, Judge.

Action by Jas. W. Smith against Henry C. Turner and others on a promissory note executed April 12, 1890, for \$2,440, with interest from date at the rate of 10 per cent. per annum. The following payments are alleged to have been made and indorsed upon the note, viz.: November 3, 1890, \$83.75; May 25, 1891, \$40; December 2, 1891, \$15; and September 5, 1893, \$160. The prayer is for \$3,974.20, and \$250 additional, as a reasonable attorney's fee for instituting this action.

The answer admits the execution of the note, but denies all payments and endorsements thereon, except the one of \$83.75, and denies any liability on account of attorney's fees. For a further and separate defense to the action, the defendants allege that, as an inducement to the execution of said note, the plaintiff entered into a contract in writing with defendants whereby he agreed to advance to them, for the purpose of harvesting their crop of grain, consisting of about 500 acres, in the summer of 1890, all sums of money necessary thereto, not to exceed in the aggregate \$1,000, the same to be paid

*This section reads as follows: "The rate of interest shall be * * * on all moneys after the same become due; on judgments and decrees for the payment of money; on money received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied, or on money due upon the settlement of matured accounts from the day the balance is ascertained; * * *."

upon their order or demand ; that defendants relied upon such agreement, and made no other arrangements for money with which to defray the expenses incident to such harvesting, but that plaintiff failed and refused to furnish said money or any part thereof although due demand was made upon him therefor ; that said crop was of the value of \$3,200, and that, by reason of plaintiff's failure to supply said money, defendants were unable to harvest the same, whereby it was wasted and lost to them, to their damage in the sum of \$2,700, "being the sum of \$200 over and above the amount then due upon the promissory note mentioned in the complaint ; that, by reason of the premises, the defendants were at said time, and still are, damaged in the sum of \$200 over and above the amount due upon said note, for which sum the plaintiff then and there became indebted to the defendants." For a second separate defense and counterclaim, the defendants allege, in substance, that plaintiff sold, disposed of, and converted to his own use certain personal property belonging to the defendants, of the value of \$1,000, by reason whereof plaintiff became indebted to defendants in the further sum of \$1,000, no part of which has been paid. Their prayer is for \$1,200 and costs against plaintiff. A demurrer was filed to the separate defenses, which was overruled, and, because of plaintiff's absence in California, on account of ill health, and a lack of definite or sufficient knowledge on the part of his attorneys respecting the matters alleged in the answer to enable them to interpose a defense, the plaintiff was unable to reply, for which reason application was made for a continuance, but this was also denied, and the parties were directed to proceed to trial before a jury, which resulted, May 9, 1897, in a verdict for defendants for \$1,200. Judgment was accordingly rendered, and plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *Waters & Gowan* and *Alfred S. Bennett*, with an oral argument by *Mr. Bennett*.

For respondents there was a brief over the names of *Lionel R. Webster* and *John W. Biggs*, with an oral argument by *Mr. Webster*.

MR. JUSTICE WOLVERTON delivered the opinion of the court.

It is urged on the part of the plaintiff that the verdict was for a larger sum than was justified by the pleadings, and, owing to the state of the record, this presents the only question which we feel called upon to decide at the present time. It is well understood that interest is not demandable, under our statute, upon unliquidated claims or demands: *Hawley v. Dawson*, 16 Or. 344, 349 (18 Pac. 592) ; *Pengra v. Wheeler*, 24 Or. 532, 536 (34 Pac. 354). The plaintiff's claim bears interest because there is a contract to pay it, while, under the rule announced, the defendants' counterclaims do not ; but it is attempted to counterclaim as respects the first separate defense as of the date when it is alleged the damages accrued, and thereby cut off the running of interest upon the note. This cannot be done, however, because it required the verdict of the jury, or at least the confession or default of the plaintiff, to liquidate the defendants' demand for their alleged damages arising by reason of plaintiff's supposed breach of contract, while the note draws interest by force of its direct stipulations. Measured by this rule, the verdict of the jury is larger than the pleadings will admit of by \$181.10. The note, with interest to the date of the verdict, less the payments indorsed as shown by the complaint, aggregates \$3,881.10, while the

aggregate demands of defendants amount to \$3,700 only. These considerations reverse the judgment of the court below, and it is so ordered; and, further, that the cause be remanded for such other proceedings as may seem proper.

REVERSED.

Decided at PENDLETON, 18 August, 1888.

RE ASSIGNMENT OF WOODALL.

[54 Pac. 209]

INSOLVENCY—COMPENSATION OF ASSIGNEE.—An assignee for creditors is entitled to a reasonable compensation considering the time and talent required and the character of the service performed, and the amount is to be determined by the court, under section 3180, Hill's Ann. Laws, which authorizes the allowance to an assignee of such commissions as may be considered just.

From Grant: MORTON D. CLIFFORD, Judge.

This is a proceeding to determine what commissions should be allowed to the assignee of an insolvent debtor in the settlement of his final account. It appears that R. O. Woodall was engaged in conducting a general store at Long Creek, Grant County, and, being unable to pay his creditors, made a general assignment for their benefit by executing a deed of all his property not exempt from execution to O. L. Patterson, who duly qualified as assignee, filed with the clerk of the circuit court of said county an inventory of the trust estate, which was valued at the sum of \$7,265.16, gave the required notices, collected the sum of \$1,185.12 on account of debts due the estate, but employed a clerk to manage the store, who realized the sum of \$2,553.33 from the sale of goods therein; that, said insolvent having effected a settlement with his creditors, the assignee filed his final account, whereupon Woodall excepted to the following items thereof, to wit: "To service of assignee, \$690; to service of salesman, \$406.50." Issue

having been joined thereon, a trial was had, and from the evidence taken thereat the court found, in substance, that the salesman was entitled to \$45 per month as a reasonable compensation for his services, amounting to the sum so demanded, and that, if Patterson had performed all the duties connected with his office as such assignee, he would have been entitled to \$100 per month, and deducting the amount to which the salesman was entitled from the sum which the assignee could have earned, awarded the latter \$506 as a reasonable compensation, and made an order approving the final account thus modified, and discharging the assignee, from which Patterson appeals.

For appellant there was an oral argument by *Mr. Chas. W. Parrish*.

For respondent Woodall there was a brief over the name of *Jas. A. Fee* and *Tkornnton Williams*, with an oral argument by *Mr. Fee*.

MR. CHIEF JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

It is admitted that the assignee faithfully discharged the trust which he accepted, and personally performed all the duties connected therewith, except caring for the store; and the evidence tends to show that, if he had devoted his whole time and attention to the management of the estate, he could have performed all the service which the business demanded, thereby rendering it unnecessary to have employed a salesman. The statute prescribing the duties and compensation of an assignee requires that he shall, as soon as the estate can be settled, render a final account of his trust to the circuit court, which is authorized to allow him such commis-

sion as may be considered just and right. Hill's Ann. Laws, § 3180. It is held in some jurisdictions that where the deed of assignment contains no express stipulations for compensation to an assignee, and the statute fails to make any provision therefor, he is entitled to none; while in others it is held that upon the settlement of his account he is entitled to the same commissions allowed to an executor or administrator, or there may be paid to him such reasonable compensation on account of his services as the court may deem just. Burrill, Assignm. § 376 *et seq.* The assignee having accounted for the sum of \$7,265.16 as the value of the whole estate, if he is to be allowed the same commission thereon as is ordinarily awarded an executor or administrator, his compensation would have been only \$265.30. Hill's Ann. Laws, § 1180.

An assignee may deem it expedient and to the best interests of the estate to continue the operation of the business in which the assignor was engaged, in the hope that the insolvent may be enabled thereby to pay his creditors' demands, and thus redeem his property; but in the case of a decedent's estate no such expectation can ever be entertained, and hence the assignee may be required to perform greater service than is demanded from an executor or administrator, in view of which the commissions allowed the latter would often be entirely inadequate for the former. When such extra service has been rendered by the assignee, he ought to have such compensation as would be reasonable, in view of the time, talent, and character of service employed in the management of the trust estate. The allowance of compensation to an assignee for service rendered in the discharge of his duties must necessarily be a matter resting largely within the discretion of the circuit court, which, being cognizant of the character of the service performed, can ordinarily be depended upon to make a fair allow-

ance for unusual demands upon the assignee's time ; and, this being so, the amount so awarded ought not to be disturbed on a review of its acts on appeal, unless it clearly appears that there has been a manifest abuse of discretion, or that the amount allowed is disproportionate or not equivalent to the service performed. *Muldrick v. Galbraith* (Or.) 49 Pac. 886. The evidence shows that Patterson made several journeys from Long Creek to Canyon City and elsewhere in the interests of the estate, but we think the court allowed him a reasonable compensation for his service, or, at least, that there has been no abuse of discretion ; and hence it follows that the judgment must be affirmed.

AFFIRMED.

Decided at PENDLETON, 13 August, 1898.

LOMAX v. WALK.

[54 Pac. 199]

CHATTEL MORTGAGE—ACCOUNTING.—A chattel mortgagee whose mortgage authorizes him to take possession of the mortgaged property at any time he deems himself insecure who takes possession of the same before the maturity of the note secured by the mortgage, must account therefor at the value of such property when he takes possession.

From Union : STEPHEN A. LOWELL, Judge.

Suit by Leroy Lomax against G. M. Walk, in which it was decreed that there were equal mutual accounts between the parties and that each party should pay his own costs. Plaintiff appeals.

REVERSED.

For appellant there was a brief over the name of *Finn & Ivanhoe*, with an oral argument by *Mr. F. S. Ivanhoe*.

For respondent there was a brief over the name of *Baker & Baker*, with an oral argument by *Mr. J. F. Baker*.

MR. JUSTICE BEAN delivered the opinion.

This is a suit for the dissolution of an alleged partnership, and for an accounting. A statement of the facts sufficiently full and clear to exhibit the questions presented on this appeal is that on July 3, 1893, the plaintiff and defendant being equal owners of a band of about 2,500 head of sheep, the plaintiff mortgaged his interest therein to the defendant to secure the payment of a promissory note for \$2,650, due eleven months after date. The mortgage provides that, if the defendant "at any time deem himself insecure," it shall be lawful for him to take possession of the property therein described, "and the same to sell and dispose of at public or private sale, as he may see fit, and out of the proceeds arising from such sale to retain and pay" the amount due on such promissory note, the costs and expenses and reasonable charges for making such sale, together with a reasonable attorney's fee, and the overplus, if any, pay over to the plaintiff. On September 3, 1893, the defendant, under the provisions of the mortgage, took possession of the plaintiff's interest in the band of sheep referred to and retained possession thereof until the maturity of the note, some nine months thereafter, when he proceeded to advertise and sell the mortgaged property at public sale in the manner provided for the sale of personal property on execution. At the time he took possession, in September, 1893, the property covered by the mortgage was worth, according to the unchallenged findings of the referee, the sum of \$3,287, but before the maturity of the note, and before the sale thereof, the sheep market had so depreciated that it brought at such sale only \$2,800; and the sole question on this appeal is whether the defendant should account to the plaintiff for the value of the mortgaged property at the time he took

possession, or at the date of the sale, less the cost and expense of keeping the property in the meantime.

The validity of the mortgage, and the right of the defendant to take possession of the mortgaged property before the maturity of the note, are conceded by the plaintiff. His sole contention is that defendant, having exercised the right given him, and taken possession of the property, ought to have sold and disposed of it within a reasonable time thereafter, and, not having done so, he must account for its value at the time of the taking. The rule upon this subject, as gathered from the authorities, seems to be that a mortgagee of personal property of a perishable nature, or the value of which is liable to fluctuate in the market, who takes possession under the terms of his mortgage, must sell and dispose of the property in the manner authorized by law for a foreclosure of such mortgage within a reasonable time thereafter, or he will be liable for its value at the time he took it into his possession: Jones on Chattel Mortgages, § 773; 2 Cobbey on Chattel Mortgages, § 988; *In re Haake*, 2 Sawy. 231, Fed. Cas. No. 5,883; *Lee v. Fox*, 113 Ind. 98 (14 N. E. 889); *Waite v. Dennison*, 51 Ill. 319; *Howery v. Hoover*, 97 Iowa, 581 (66 N. W. 772); *Whittemore v. Fisher*, 132 Ill. 243 (24 N. E. 636). And in our opinion it is of no consequence, under the terms of a mortgage like the one in hand, that he takes possession before the maturity of the note. If he exercises a right given him by the mortgage, and takes possession before the note becomes due, he is bound to exercise the same degree of diligence in selling and disposing of the property as if the note had matured. The mortgage does not authorize him to take and retain possession until the maturity of the note, and then, when perhaps the property has depreciated in value by use or age, sell it, and demand of the mortgagor payment of the deficiency.

His right to take possession is for the purpose of foreclosing his mortgage by selling and applying the proceeds of the property to the payment of his debt. And when he takes such possession he must proceed diligently to foreclose, or he will be required to account to the mortgagor for the value of the property taken.

It follows from these views that the court below was in error in holding that defendant was not obliged to account for the value of the mortgaged property at the time he took possession, but only for the amount received therefor at the sale made in 1894, less the cost and expense of caring for the same. And, as the correctness of the other items going to make up the account as stated by the referee is not controverted on this appeal, the decree of the court below will be reversed, and a decree entered here in accordance with the report and recommendations of the referee; the plaintiff to recover his costs upon the appeal.

REVERSED.

Decided at PENDLETON, 13 August, 1898.

FARMERS' NAT. BANK v. GATES.

[54 Pac. 205]

ASSUMING PAYMENT OF MORTGAGE.*—One who accepts a conveyance of lands in which it is provided that the grantee shall assume the payment of a lien on such land makes the debt his own as though he had originally executed it: *Miles v. Miles*, 8 Or. 266, and *Walker v. Goldsmith*, 7 Or. 162, approved.

MORTGAGE FORECLOSURE — PARAMOUNT TITLE.—Where the owner of an upland bordering on a body of water mortgages such upland to one person and afterwards the land under the water to another, the owner of the first mortgage may properly in a foreclosure proceeding determine the extent and position of his rights as against the holder of the second mortgage. Such an adjudication will not be a violation of the rule against litigating questions of paramount title in mortgage foreclosures.

* NOTE.—The holding in the present case is in line with the authorities elsewhere as fully appears in the following annotated cases: *Enos v. Sanger*, 65 Am. St. Rep. 38, 37 L. R. A. 862; *Boone v. Clark*, 5 L. R. A. 276; *Gifford v. Corrigan*, 15 Am. St. Rep. 514, 6 L. R. A. 610; *O'Connor v. O'Connor*, 7 L. R. A. 3; *Rice v. Sanders*, 8 L. R. A. 315, 23 Am. St. Rep. 808; *Jefferson v. Asch*, 25 L. R. A. 275, 39 Am. St. Rep. 618; *Hare v. Murphy*, 29 L. R. A. 851; *Knapp v. Conn. Mut. Life Ins. Co.*, 40 L. R. A. 861.—REPORTER.

From Union : STEPHEN A. LOWELL, Judge.

Suit by the Farmers' & Traders' Nat. Bank of La Grande against Lavia A. Gates, the Western & Hawaiian Invest. Co., Lt., and others to foreclose a mortgage, consolidated with a suit of a similar nature by Jno. F. F. Brewster against the same persons. The suit having been dismissed as to the Investment Co., plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. J. D. Slater*.

For respondent, the Investment Co., there was a brief over the name of *Fenton, Bronaugh & Muir*, with an oral argument by *Mr. Earl C. Bronaugh, Jr.*

MR. JUSTICE BEAN delivered the opinion.

This is a suit to foreclose a mortgage, and the only question for our consideration is whether the court below erred in dismissing the suit as to the Western & Hawaiian Investment Company, Limited. The facts necessary to an understanding of the question, as they appear from the pleadings, are that in July, 1891, the defendant Vina Gates and her husband mortgaged to the plaintiff's assignor certain real property, including lots 1 and 2 in section 29, township 3 south, of range 39 east, and on April 27, 1892, conveyed the same to the defendant Nodine by a deed containing a stipulation wherein he assumed and agreed to pay the mortgage as part of the purchase price. As shown by the public surveys, the premises referred to are bounded on the south by Tule Lake, which the plaintiff claims and alleges to be a non-navigable body of water, but which, according to defend-

ants' allegations, is swamp and overflowed land. At the time of Nodine's purchase from Mrs. Gates, he had, or soon thereafter obtained, a deed from the state for the bed of the lake as swamp land, and on July 14, 1893, mortgaged the portion thereof immediately in front of the premises described in plaintiff's complaint, and below the meander line, to the defendant corporation. The plaintiff thereafter began this suit to foreclose its mortgage; and assuming that, under the doctrine of riparian rights, its mortgage covers the land to the middle of the lake, made the defendant corporation a party, as a subsequent mortgagee. But the court below held that the question of title thus presented could not be tried in this suit, and dismissed the complaint as to the defendant corporation.

It is familiar doctrine that a suit to foreclose a mortgage is not an appropriate proceeding in which to litigate questions of adverse or paramount title (2 Jones, Mortg. 1445; *San Francisco v. Lawton*, 18 Cal. 465, 79 Am. Dec. 187; *Banning v. Bradford*, 21 Minn. 308, 18 Am. Rep. 398; *Summers v. Bromley*, 28 Mich. 125); and it is sought to invoke this principle in support of the rulings of the court below. But the question here presented is of an altogether different character. It is practically, as we view it, a controversy between mortgagees claiming under the same mortgagor, and not adversely to him. It is true, plaintiff's mortgage was not executed by defendant Nodine; but, by the terms of the conveyance from Gates, he assumed and agreed to pay it as part of the purchase price, and thus made it his own as effectually as if he had executed it himself. *Miles v. Miles*, 6 Or. 266 (25 Am. Rep. 322); *Walker v. Goldsmith*, 7 Or. 161; *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547, (40 Pac. 27); *Burbank v. Roots*, 4 Colo. App. 197, (35 Pac. 276); *Clark v. Fisk*, 9 Utah, 97, (33 Pac. 248). So that

the case stands substantially as if Nodine, being the owner of the upland bounded by Tule Lake, by purchase from Gates, and having a deed to the bed of the lake from the state, as swamp and overflowed land, had mortgaged the upland according to legal subdivisions to plaintiff, and subsequently the bed of the lake immediately in front thereof to the defendant. Under such circumstances, it seems to us the plaintiff would have a right, in a suit to foreclose its mortgage, to litigate and have tried and determined, as between it and the defendant, the question as to whether there is any conflict in the mortgages of the respective parties (*Board of Sup'rs of Iowa Co. v. Mineral Point R. Co.*, 24 Wis. 121) ; *Baass v. Chicago & N. W. Railway Co.*, 39 Wis. 296) ; and such is practically the question here presented. The decree of the court will therefore be reversed, and the cause remanded, with direction to try out the questions in controversy between the parties.

REVERSED.

Decided at PENDLETON, 13 August, 1898.

BREDDING v. WILLIAMS.

[54 Pac. 206]

APPEAL—FINDINGS OF FACT.—It is the imperative duty of a law court *sua sponte*, when hearing a cause without a jury, to make findings of fact on all the material issues presented by the pleadings, and if this has not been done the case will be reversed: *Moody v. Richards*, 29 Or. 282, and *Daly v. Larsen*, 29 Or. 535, followed.

From Umatilla : STEPHEN A. LOWELL, Judge.

This is an election contest to determine whether Christ Bredding or James Williams is entitled to the office of school director of district No. 69, Umatilla County, Or. The notice of contest alleges, in purport, that there was an election held in said district on the first day of March, 1897, at which the defendant received only nine legal

38	391
37	434

38	391
40	65

33	391
41	286

33	391
46	187

46	472
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votes, and was declared elected ; that the plaintiff was a candidate at such election ; that six legal votes were cast for him thereat, and duly counted, and that, in addition thereto, John Richmond, Dan Richmond, Janet Dand, George Seevers, Gustave Eichner, Gus Schubert, Charles Thornton, and Hank Fanning, eight competent and qualified electors of the district, tendered their votes in writing for him for said office, but were prevented from casting such votes by the wrongful and fraudulent acts of the judges of said election, and that, if such votes had been received, they would have elected him to such office ; that the said John Richmond, Dan Richmond, Janet Dand, George Seevers, Gustave Eichner, Gus Schubert, and Charles Thornton were each and all qualified electors, in this : that each of them was a *bona fide* resident of said district, and had been for more than thirty days prior to such election, and was and had been a resident within the State of Oregon for more than six months prior thereto, and had property within the district upon which he paid a tax ; that Hank Fanning was a qualified voter, having a child over the age of 4 years and under 20, and having resided in the district for more than thirty days, and within the state for more than six months, prior to the election. The answer puts in issue all the allegations of the notice of contest, except that Bredding was a candidate for office, and, for further and separate defense, alleges certain facts showing the election of the defendant as director of said district at such school election, and affirmatively sets forth facts showing the disqualification of the persons and individuals whom plaintiff claims offered, but were not permitted to cast, their votes for him, and prays the dismissal of the complaint, and for his costs and disbursements. The affirmative allegations of the answer were put in issue by the reply. The judg-

ment of the court was in accord with the prayer of the answer, and plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *Stillman & Pierce* and *John W. Haller*, with an oral argument by *Mr. A. D. Stillman*.

For respondent there was a brief over the names of *John J. Balleray* and *Marion A. Butler*, with an oral argument by *Mr. Balleray*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

There were no findings made or filed in the court below, and it is urged that the judgment should be reversed for want thereof. Matters of contest of the nature here for consideration are required to be heard and determined by the court without the intervention of a jury, as actions at law, in contradistinction to suits in equity; and it is a prerequisite that the court shall make findings of fact, as this court will not look into the evidence except to ascertain whether there is any to support a given conclusion, nor will it try the case *de novo*: *Hill's Ann. Laws*, § 2547; *Hughes v. Holman*, 23 Or. 481, 483 (32 Pac. 298); *Hartman v. Young*, 17 Or. 150, 155 (2 L. R. A 596, 11 Am. St. Rep. 787, 20 Pac. 17); *Fenton v. Scott*, 17 Or. 190 (11 Am. St. Rep. 801, 20 Pac. 95). We have recently held that it is the duty of the court, when sitting in the trial of a cause without the intervention of a jury, to make findings of fact upon all the material issues presented by the pleadings, failing in which it would be cause for reversal of the judgment entered without them, and that it is not necessary to a presentation of the question here that a previous request should

have been made for such findings: *Moody v. Richards*, 29 Or. 282 (45 Pac. 777); *Daly v. Larsen*, 29 Or. 535 (46 Pac. 143). Such request is requisite when findings are desired upon some collateral issue which may have arisen pertinent to the cause on trial, but not as to issues directly presented by the pleadings and material to the cause of action or defense: *Tatum v. Massie*, 29 Or. 140 (44 Pac. 494). Now, there were distinct issues of fact presented by the pleadings in the present contest, material to the cause of action and to the defense interposed thereto; and, no findings having been made or filed touching any of them, it is apparent that the judgment made and entered has no sufficient basis for its support. The written argument and reasoning of the court in support of the judgment contained in the transcript cannot be treated as its findings of fact and conclusions of law. It follows that the judgment must be reversed, and the cause remanded for such further proceedings as may seem proper, not inconsistent with this opinion; and it is so ordered.

REVERSED.

Decided at PENDLETON, 13 August, 1898; rehearing denied.

FARMERS' BANK v. SALING.

[54 Pac. 190]

EXAMINATION OF WITNESSES.—Where a party on cross-examination brings out matters not testified to on direct, he cannot complain of the witness being examined as to such matters on redirect.

EVIDENCE.—On an issue of the membership of a firm to which a loan had been made, there being two firms of the same name, testimony of the lender as to which one of the firms he understood he was lending the money to is admissible.

IDEM.—To prove defendant's membership in a firm, testimony that witnesses understood or believed defendant to be a member is admissible, where such witnesses state the facts from which they derive their understanding or belief, and such facts are proper for the consideration of the jury.

TRIAL—VALUE OF EVIDENCE.—Where a witness testifies to facts as of his own knowledge, and on cross-examination it appears that the sources of his knowledge are meager, his testimony will not be stricken out; its value being for the jury.

EXAMINATION OF WITNESSES.—A witness cannot on redirect examination be asked whether he had any reason to doubt that a specified defendant was a partner in the firm which executed the notes in suit, where there was nothing in the cross-examination to call out such a question.

EVIDENCE OF PARTNERSHIP.—Testimony that witness had left money on deposit with a firm on the faith and credit of defendant is inadmissible to prove defendant's membership in the firm.

IDEM.—To prove a person's membership in a firm, letterheads and sacks on which his name is printed as a firm member, used by such firm in its business at a date subsequent to the time of incurring the liability sued on, are admissible in corroboration of other independent evidence on that issue.

IDEM.—On an issue whether one of the defendants was a member of a firm which signed certain notes it was competent to offer in evidence the notes and letters dated some months later, but signed in the same handwriting and written on letterheads having the name of the defendant as one of the partners. The documents, being signed by the same person, are *prima facie* evidence that the firm whose name was signed to the note was the same firm whose names appear on the letterhead.

AMENDING PLEADINGS—DISCRETION.—A liberal practice prevails in Oregon regarding amendments to pleadings: thus, where action was brought on a note dated 9 Sept., 1892, and it developed on the trial that the date should have been 9 Sept., 1893, it was proper to allow the complaint to be amended, it being apparent that the defendants had not been misled. *Mendenhall v. Harriaburg Water Co.*, 27 Or. 38, explained, and *Cook v. Croisan*, 25 Or. 475, cited.

IMPEACHMENT.—For the purpose of deprecating the value of a witness' testimony it may be shown, on proper foundation, that the person has made out of court statements on the matter in question contradicting his evidence in court.

BANKS—NOTICE TO CASHIER.—Notice to the cashier of a bank is notice to the bank, in transactions conducted by him for it within the scope of his authority, regardless of his *bona fides* in conducting such transactions, where the bank adopts his acts.

From Umatilla: STEPHEN A. LOWELL, Judge.

Action by the Farmers' Bank of Weston, Oregon, against I. E. Saling and others on two notes. The plaintiff had judgment from which I. E. Saling appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Messrs. Chas. H. Carter and J. H. Raley*.

For respondent there was a brief over the names of *Stillman & Pierce* and *Balleray & Hailey*, with an oral argument by *Messrs. John J. Balleray* and *A. D. Stillman*.

MR. JUSTICE WOLVERTON delivered the opinion of the court.

This is an action to recover upon two promissory notes,—one executed September 9, 1893, by Saling & Co. to the plaintiff for \$2,500, and the other March 23, 1893, to Joseph Zigman for \$565, and by him indorsed to plaintiff. It is alleged that, during the times named, I. E. Saling, Frank Saling, and P. A. Worthington were partners doing business under the firm name of Saling & Co. I. E. Saling, by separate answer, controverts the plaintiff's allegation that he was a partner of the concern; and upon this issue all the questions presented for our determination arise, except one involving the discretion of the court to allow an amendment of the complaint touching the date of one of the notes sued upon.

George A. Hartman, a witness for plaintiff, testified substantially that he was a director in the plaintiff bank; that he knew the members of the firm of Saling & Co. in 1891, 1892, 1893, and 1894, and that it was composed of I. E. Saling, Frank Saling, and P. A. Worthington. On cross-examination he said he knew such to be the fact because he had some business with them, and their stationery and billheads indicated as much. The examination developed a contention that there were two firms doing business in Weston,—one under the name of Saling & Co., and engaged in merchandising, composed of Frank Saling and P. A. Worthington, and the other doing a milling business composed of I. E. Saling, Frank Saling, and P. A. Worthington, but it was questioned whether it did business under the style of the Weston

Roller Mills, or Saling & Co. On redirect examination the witness was asked the following question: "Three, four, or five years ago, when this money was loaned, did you have any knowledge that there was any distinction between the firms?" To this question there was an objection, which was overruled, and the defendant answered, "I did not." But, upon the question being reread, the witness answered further: "Yes; I think there was. I want to correct that answer, I did think at that time that there was a difference." Immediately following which he was asked: "Whom did you understand you were loaning the money to?" to which he answered, over objections, "Saling & Co.,—I. E. Saling, P. A. Worthington, and Frank Saling." These constitute the second and third assignments of error. As it concerns the second, it was proper for the plaintiff to make the inquiry on the redirect examination, as the defendant had on cross-examination elicited the fact that there were possibly two firms doing business as Saling & Co., but composed of individuals not the same. The effect was to trace the witness' knowledge of their existence back to the date of the loans, and of this defendant cannot complain, as the subject was a matter which he himself elicited.

The question upon which the third assignment of error is based follows quite naturally from the one discussed. After the possible existence of the two firms had been mooted, it was pertinent evidence to go to the jury touching the identity of the firm to which the money was loaned. As it respects the form of the question, "Whom did you understand you were loaning the money to?" it would seem to be unobjectionable. The inquirer was seeking for the knowledge of the witness, and used the word "understand" for the ascertainment of that fact. It was not a question of opinion, common rumor, or rep-

utation, but of knowledge, and the language employed was not inappropriate to the purpose.

Subsequently George Proebstel was called as a witness for plaintiff. He testified, in substance, that he was a director of the plaintiff bank, and was such director at the time the money was loaned to Saling & Co. The following colloquy then occurred: "Q. Do you know—and, if so, state—who composed the members of the firm? By counsel for defense: Q. First, do you know who comprised the members? A. I think I do; I have good reason to believe that I know. Q. You believe you know? A. Yes, sir." Objection was then interposed to the witness answering touching the membership, but, being overruled, he stated that P. A. Worthington, I. E. Saling, and Frank Saling composed the firm. In this connection we may consider the eleventh, twelfth, and thirteenth assignments. I. J. Price, as a witness for plaintiff, testified that he was a director of the bank, and then as follows: "Q. State, if you know, who composed the members of that firm. A. I could not positively state. Q. Have you any reason for knowing? A. Nothing, only from observation,—the actions of the parties. Q. Have you ever seen any letterheads or billheads that indicated who the partners were? A. Yes, sir; I have seen a good many letterheads and billheads. Q. Have you done business with the concern? A. Yes, sir. Q. Now, from your observation, and the letterheads and billheads which you have seen, who do you say were the partners in the concern,—and also taking into consideration the business transactions which you have had with the concern? A. Well, according to the billheads, it would be pretty hard for a man to tell who was. Sometimes it is Frank Saling, P. A. Worthington, Bullfinch, and sometimes it is Press Worthington or P. A. Worthington, Frank Saling, and I. E. Saling, and Frank

Saling and P. A. Worthington. Q. Well, have you any idea at all as to who the partners were in that concern? From your transactions with them, and from what you have seen of the letterheads and billheads that you have seen, and from their conduct in and about the business, have you any knowledge as to who the partners are? A. Not positive. Q. I don't ask you to swear positively. A. Well, I always understood — My understanding of the business was that Mr. I. E. Saling was the head of the firm."

It is insisted that these questions call for the belief or opinion of the witnesses, and not for their knowledge, and were therefore incompetent to prove the fact of partnership. It may be premised that a partnership association is proven as any other fact. If not susceptible of direct proof, it may be established by circumstances which may lead to a belief of the existence, such as participation in the profits, the acts of individuals in the apparent discharge of firm business, advertisements purporting to contain the individual names composing the firm, with knowledge of the party sought to be charged, and the like; and especially is this true where it is incumbent upon a third party to affirm the existence of such relationship. As a general rule, common rumor or reputation, and the belief or opinion of witnesses based upon hearsay, is not competent evidence to establish the fact: *Hicks v. Cram*, 17 Vt. 449; 2 Rice on Evidence, § 451; *Adams v. Morrison*, 113 N. Y. 152 (20 N. E. 829). There is nothing in the examination of either of these witnesses to indicate that general reputation or common rumor touching the membership of the concern was sought for. The witness Proebstel believed that he knew, while Price was asked, from his observation, and the billheads and letterheads which he had seen, taking into consideration the business transactions which he

had with the concern, to state who were the partners. And in neither instance was there any call for belief or opinion founded upon hearsay. The witness Proebstel was permitted to name the members, but the source of his knowledge or the foundation for his belief were proper subjects of test by cross-examination. It was disclosed that he had some knowledge, though cursory and not very convincing, of the history of the firm doing business under the name of Saling & Co.; but there was enough to go to the jury and it was for them to determine, under proper instructions, whether he had any real knowledge of its true membership, notwithstanding his assertion that he knew, or believed he knew, who the partners were. Price frankly stated that he could not answer positively touching the membership, but he was pressed until he finally stated that his understanding was that I. E. Saling was the head of the firm. It is pertinent to say here that some flour sacks and letterheads had been previously offered in evidence; the sacks having upon them, "The Weston Roller Mills. Saling & Co., Proprietors"; and the letterheads, the names "I. E. Saling," "Frank Saling," and "P. A. Worthington," in addition. The deduction which the witness was pressed to make from his observations is the result which it was the duty of the jury to declare from the witness' narration of such observations. Although there is some authority for the course pursued, it is not to be commended.

In *Seekell v. Fletcher*, 53 Iowa, 330 (5 N. W. 200), the witness was asked the following question: "Now I will get you to state again, from the manner of their dealings with you prior to the execution of this note, whether or not it was understood by you at the time that they were partners or not." And he was permitted to answer, and was sustained by the supreme court; *ROTH-*

ROCK, J., saying: "It does not appear that this testimony was in the nature of an opinion. It is rather the expression of a belief upon the part of the plaintiff that there was a partnership at and before the date of the note. If the defendant Vandusen's acts and representations were such as to induce the plaintiff, as a reasonably prudent man, to believe his statements that he was a partner with Fletcher, we know of no reason why the plaintiff should not be allowed to state to the jury that it was in that belief he acted when he made the sale and took the note; and it was then for the jury to say whether the facts justified his belief. The word 'understood' may not have been, and probably was not, the best word that could have been used to express the idea sought; but the error, if any, is too inconsiderable to warrant a reversal upon that ground." So it is here; if there was error in permitting the witness to answer the question in the form in which it was put to him, it was surely harmless, considering the absolute frankness with which he answered, and the utmost fairness with which he disclosed the information he possessed, and stated the nature of his belief. It is very apparent that the jury could not have been misled. The understanding or belief—whatever it may be termed—was not based upon hearsay, or upon evidence within itself not admissible, but upon matters proper of themselves to go to the jury. Proebstel stated his knowledge with more positiveness, but his cross-examination developed the fact that he had less real knowledge touching the matter than Price; yet it was not prejudicial error to submit the whole to the jury, as they were the proper judges of the weight of the testimony after it had been tested by the cross-examination.

The twenty-seventh assignment illustrates very well

what we have said touching the province of the jury to determine from all the witness' testimony what credit should be given him. Charles M. Pierce testified that he knew who composed the firm of Saling & Co., and that it was I. E. Saling, P. A. Worthington, and Frank Saling; but on cross-examination it must be admitted that his sources of absolute knowledge were meager, and when it was concluded the appellant moved the court to take the whole testimony from the jury for the reason that it appeared the witness was not testifying from his knowledge, but was giving conclusions which it was the province of the jury to determine; and the learned trial judge very properly said, in overruling the motion, that the object of the cross-examination was to show the value of the direct testimony, which the jury must determine.

But upon redirect examination, which is comprehended by the fourteenth assignment, it was more than harmless error to permit plaintiff's counsel to ask the witness Price whether he had any reason to doubt that I. E. Saling was a partner in the concern. There was nothing in the cross-examination to provoke such a question, and it was the equivalent of saying in a short-hand way that the matter was of such universal notoriety that everybody so understood it. *Hicks v. Cram*, 17 Vt. 449.

Again, witness was asked on whose faith and credit he left certain money on deposit with the firm, to which he answered, "Mr. I. E. Saling." The same question, in purport, met with the disapproval of the court in *Danforth v. Carter*, 4 Iowa, 230, 236. This latter exception is saved by the fifteenth and sixteenth assignments.

The twenty-eighth and twenty-ninth assignments are based upon the following questions propounded to Charles M. Pierce upon a redirect examination, viz.: "Is it not a fact that everybody that talked about the con-

cern talked about I. E. Saling?" and other questions of similar import. This information, however, was not sought to prove a substantive fact for the purpose of establishing plaintiff's cause, as was the case under the fourteenth assignment, but it appears to have been superinduced by the cross-examination, whereby it was elicited that witness had heard a good many people say on the outside that I. E. Saling was a member of the firm, and for that reason defendant ought not to complain.

Assignment 5 arises upon the introduction of the sacks and billheads in evidence, containing the advertisements, "Western Roller Mills," and "Saling & Co., Proprietors," etc., heretofore referred to; and the objection is placed upon the ground that they were not shown to have been in use at the time of the execution of the notes in question, but at a subsequent date. The letterheads appear, from letters written under them, to have been in use some six months later, but it does not appear so definitely as it respects the sacks. However this may be, there was other testimony tending to show the existence of the firm composed of the specified membership at the date of the execution of the notes; and it was not improper to admit the sacks and letter and billheads as corroborative thereof, notwithstanding their use by the firm could not be traced to the exact date of the transaction. See 2 Bates, Partn. § 1159; *Fleshman v. Collier*, 47 Ga. 253; *Gowan v. Jackson*, 20 Johns. 176.

Assignments 21, 24, and 25 refer to the admission of Exhibits C, D, E, F, G, and H in evidence over defendant's objection. D and E are the notes sued on, and C, F, G, and H are letters written six months or more later upon letter paper containing the letterhead advertisement above referred to, signed "Saling & Co." The signature to the notes and the signature to these letters appear to have been written by the same person,—probab-

bly by Worthington. The evidence was entitled to some weight to show that the firm which executed the notes was the same as the one indicated by the letterheads, and it created such a *prima facie* case of identity of firms as to require an explanation from the defendant. If, as a matter of fact, there were two firms doing business under the same name, and P. A. Worthington was a member of both, defendant was entitled to show it, but the evidence objected to was nevertheless pertinent for the purpose for which it was offered. Another objection was urged to the introduction of Exhibit E, which will be disposed of in the next assignment.

Assignments thirty-one and thirty-two arise, the first on defendant's motion for a nonsuit when plaintiff had rested, and the second upon the order allowing plaintiff's motion to amend the complaint as to the date of the execution of the \$2,500 note so as to change it from September 9, 1892, to September 9, 1893. Worthington, when called as a witness for defendant, produced a note calling for \$2,500, bearing date September 9, 1892, which was shown, by a stamp impressed upon it, to have been paid; and thereupon plaintiff asked leave to amend, assigning as a reason therefor that the pleader had made a mistake in the date of the note, and leave was accordingly granted. So far as the nonsuit is concerned, it is apparent from what has already been said that there was evidence produced by the plaintiff pertinent to go to the jury touching the individual members composing the partnership, which presented a controversy in the trial. The motion therefor was therefore properly overruled, nor was there error in permitting the amendment complained of. It could have wrought no injury or inconvenience to the defendant, because he was perfectly aware of the exact situation from the very beginning; and besides the trial had not closed, so that any evidence

pertinent to the changed condition of the pleadings might have been produced. The note intended to have been sued on was a renewal of the one stamped "Paid," and produced by Worthington, and was an exact counterpart of it, except as to date; and in that there was just a year's difference.

It is urged that, because there once existed a note exactly suited to the description of the note contained in the complaint, it was improper to allow an amendment so as to describe another and an entirely different note; but we are unable to see why such a condition presents a barrier to the correction of a palpable mistake. There was a very material difference in the notes; one being cancelled, and the other an existing obligation. The mistake was concerning the outstanding obligation, and it can make no difference that the description intended to designate it as the one sued on happened to fit some other obligation, whether cancelled or not. The defendant not being misled to his prejudice, the amendment was within the discretion of the court. Courts are always liberal in allowing amendments to pleadings in the furtherance of justice,—a practice so familiar that it is unnecessary to cite authorities in its support. The amendment was resisted upon the authority of *Mendenhall v. Water Co.*, 27 Or. 38 (39 Pac. 399); it being contended that the trial court was without authority to allow it. The case is in point, but it only decides that in that particular instance there was no abuse of discretion in not permitting the defendant to amend after his evidence had gone in under objections before a referee. What was said respecting the court's authority to allow the amendment was through inadvertence, and is not controlling, as the question considered was not one of power in the court to make it, but one purely of discretion, and whether there had been an abuse of it. In this view the

case is authority in support of the amendment. See, also, *Cook v. Croisan*, 25 Or. 475 (36 Pac. 532).

Assignment forty-six has reference to an interrogatory put to Worthington touching a supposed conversation he had with one F. M. Anderson for the purpose of laying the foundation for the witness' impeachment. It is objected that the attempted impeachment was upon an immaterial matter, and it was suggested that what witness might have said concerning the partnership could not bind the defendant I. E. Saling, unless he was present and heard the conversation ; but the witness had testified that Saling was not a member of the firm, and, if he had made statements out of court of contradictory tenor, the matter was both relevant and pertinent, not for the purpose of binding Saling, but for the impeachment of the witness by showing contradictory statements.

The forty-seventh assignment is based upon the objection to a question put to the defendant's witness Worthington upon cross-examination, as follows : " What did you do with that land " ? It had been developed that Saling & Co. had disposed of their stock of goods and had taken some land in exchange ; and the question concerned this land. It was not without the sound discretion of the court to allow the question on cross-examination, and surely it was perfectly harmless in any event.

The sixty-third assignment concerns the following instruction given by the court, viz. : " I instruct you that notice to the cashier of the bank is notice to the bank, in transactions conducted by such cashier, acting in good faith for the bank, within the scope of his authority, whether his knowledge was acquired in the course of the particular dealing or on some prior occasion, provided the knowledge is so recent and so circumstanced in other respects as to render it reasonably probable that it was still present in the mind of the cashier when acting for

the bank in the matter to which it relates." This instruction was given at the request of the defendant, except the words "in good faith," which were added by the court, and these words constitute the sole ground of objection. Plaintiff's counsel contends that the interpolation is meaningless, and therefore harmless; but we think it means much, and in all probability had some weight with the jury, as the learned trial judge evidently intended it should have,—else why should the instruction as requested have been so modified?

It is admitted on all sides that the instruction as requested is sound in principle, and the dispute concerns the interpolation only, and we are convinced that it was error. As a feature of the case, it was submitted to the jury whether the defendant I. E. Saling had so conducted and held himself out as to superinduce the belief that he was a member; and, if so, they were instructed that Saling would be bound, whether he was in reality a member or not. And it was suggested at the trial that there was some collusion between Worthington, an admitted member of the firm of Saling & Co. and Davis, who had formerly been in the employ of Saling & Co. as clerk, and was the cashier of the plaintiff bank at the time the loans were made, to defraud the bank; and this led to the request for the instruction, in order to convey to the jury the idea that, if the bank had actual knowledge that I. E. Saling was not in reality a member of the concern, it could not be excused for acting upon appearances, or could not found a case upon estoppel, and that knowledge of its cashier in that regard was knowledge of the bank itself. Whether there was collusion or not, the plaintiff has adopted the acts of its officer and agent by seeking to enforce the obligations growing out of the transactions, and must be held to the results which would ensue upon the consummation of a good-faith

transaction of the same nature. Knowledge of the real membership was a material circumstance attending the transactions, and it cannot be permitted to ratify in part, and reject that which may operate to its disadvantage. So that the plaintiff cannot now ignore knowledge acquired through its agent upon the ground that he did not act in good faith in loaning its funds, and thereby escape the effect of such knowledge. For this and the other errors noted, the judgment of the court below must be reversed.

Many assignments have not been considered. A large proportion of them, however, are covered by those that have been, and those remaining of lesser importance may not arise again upon a retrial. Reversed and remanded.

REVERSED.

Decided at PENDLETON, 13 August, 1898.

HUNTINGTON v. CROUTER.

[54 Pac. 208]

EQUITY—RELIEF AGAINST JUDGMENT—FALSE RETURN.—Equity has jurisdiction to enjoin the enforcement of a judgment at law based on a false return of service of summons.

RETURN ON PROCESS AS EVIDENCE.—An officer's return on a process delivered to him for service is *prima facie* evidence of the material matters therein stated, but it may be contradicted.

From Baker : ROBERT EAKIN, Judge.

This is a suit by A. H. Huntington to set aside a judgment against him, and to enjoin a levy upon his property under an execution issued thereon. The facts are : That Frank Clarke and W. A. Weatherby commenced an action in the Circuit Court of Baker County, Oregon, against S. F. Murphy, J. W. Murphy, J. C. Young, and plaintiff (alleging that they were co-partners as Murphy, Huntington & Young), to recover the sum of \$503.25.

The summons issued in said action was returned with a certificate by the sheriff indorsed thereon to the effect that he had served the same, within said county and state, on March 18, 1891, on A. H. Huntington, by delivering a copy thereof, prepared and certified to by him, together with a copy of the complaint in said action, prepared and certified to by C. A. Johns, one of plaintiff's attorneys therein, to the said A. H. Huntington, in person. The other defendants in said action demurred to the complaint, but no appearance was ever made by or for Huntington. The demurrers were overruled, and, no answers having been filed, judgment was rendered against all the defendants for the amount demanded, and entered in the judgment-lien docket of said county. The defendant herein, D. H. Crouter, having obtained an assignment of said judgment, caused an execution to be issued thereon, in pursuance of which the defendant W. H. Kilburn, as sheriff of said county, levied upon certain real property of the plaintiff to satisfy the writ. Thereupon plaintiff commenced this suit, alleging that he never was a partner with either of the defendants in the law action, nor was he ever indebted to the plaintiffs therein. He also alleges that no summons or complaint in said action was ever served upon him, nor did he have any knowledge that such an action had been commenced, or that judgment had been rendered therein, until about April 1, 1897, when the said levy was made; that the sheriff who purported to have served said summons and complaint, and the sureties on his official undertaking, are insolvent; and that plaintiff has no plain, speedy, or adequate remedy at law. The defendants having denied the material allegations of the complaint, a trial was had; and from the evidence taken thereat the court found the facts, in substance, as hereinbefore and in the complaint stated, and thereupon set

aside and cancelled the judgment complained of, as to the plaintiff herein, quashed the levy, and enjoined any further levy under said execution, so far as plaintiff's property was concerned, and dissolved the lien of said judgment thereon, from which decree defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *John Bruce Messick* and *Wm. H. Packwood, Jr.*, with an oral argument by *Mr. Messick*.

For respondent there was a brief over the names of *Huntington & Wilson* and *King & Saxton*, with an oral argument by *Mr. Bela S. Huntington*.

MR. CHIEF JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

It is contended by defendants' counsel that the sheriff's return upon the summons in question is conclusive upon the parties to the action ; that plaintiff cannot controvert the facts recited therein ; and that, if he has been injured thereby, his remedy is an action against the officer for a false return,—while plaintiff's counsel maintain that the judgment rendered upon the false return, without notice to, appearance of, or defense by their client, is void ; that the circumstances rendering it so are not apparent from an inspection of the record, and, such being the case, a court of law is powerless to arrest the execution of the judgment, in view of which a court of equity is competent, and should, upon proof of the falsity of the return, afford the relief prayed for. The question presented by this appeal is one which the courts have considered with much care, resulting in decisions that are wholly irreconcilable. It was early held by the common law courts

that their judgments purported absolute verity, and were binding upon all parties thereto, in so far as the issue might have been litigated in the action, even though obtained by fraud; and this doctrine was carried to such an extent that, if the jurisdiction of the court depended upon the false return of an officer to the service of process, the party injured by the judgment could not be relieved therefrom, but after satisfying the judgment, he was permitted to maintain an action against such officer to recover the damages he had sustained. The chancellor's court, however, inculcating the doctrine that a party ought not to be deprived of his property without notice and an opportunity to be heard, enjoined the enforcement of judgments at law which were obtained by fraud or concealment. "And this," says Blackstone (3 Comm. 437), "not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking any advantage of a judgment obtained by suppressing the truth, and which, had the same facts appeared on the trial as now are discovered, he would never have attained at all."

Much complaint was made by those who were opposed to such equitable intervention, and at last, to settle the heated controversy, the matter was referred to the king (James I.) who, having obtained the advice of his counsel, gave judgment in favor of the equitable jurisdiction: 3 Blackstone's Commentaries, 53; 1 Story, Equity Jurisprudence, § 51. This decision, rendered A. D. 1616, was not satisfactory to those admirers of the principles of the common law who opposed any interference with the judgments of its courts by a court of equity; and from that time to the present the doctrine has been and is to some extent maintained that the judgment of a court of general jurisdiction ought not to be set aside by a court of equity upon evidence *aliunde* the original

record. But the prevailing doctrine of modern decisions is that, when it appears a judgment has been rendered against a party upon the false return of an officer, it is the imperative duty of a court of equity to correct the wrong and arrest the judgment, and thus avoid a circuit of remedies by compelling the party to satisfy the judgment, and thereafter seek reparation by an action against the officer, who may be insolvent. The conflict in the decisions of the different courts upon this important subject being irreconcilable, and as the question in this court is *res integra*, it becomes necessary to adopt that line which to us seems most compatible with reason, and consonant with the principles of equity.

In a note to the case of *Taylor v. Lewis*, 19 Am. Dec. 135, it is said: "The rule stated in the principal case, that a judgment cannot be impeached in equity as fraudulent and void when it appears that the officer, without combination with the plaintiff, has returned process as served on the defendant, when in fact the same never was served, can hardly be considered the prevailing rule at the present day. A few decisions are found affirming the same, but most of the modern authorities are opposed thereto." Further in the note the learned editor says: "It would seem to be one of those self-evident axiomatic propositions, that might be safely asserted without fear of successful contradiction, that no greater fraud can possibly be perpetrated than to deprive a person of his property without giving him an opportunity to be heard in his defense. To do so is repugnant to our sense of natural justice, opposed to the underlying principles of all free governments, deriving their authority from a written constitution, and is seldom, if ever, sanctioned, except where might, and not right, prevails. Yet the authorities just quoted undoubtedly have that effect; for when it is asked, and that, too, of those marvels of wis-

dom, and guardian angels of the rights of persons, courts of equity, to relieve against the commission of such an outrage (fraud *per se*, it might truthfully be said), and to prevent one man through the medium of courts of justice from confiscating the property of another, their answer is, 'Inasmuch as you have a cause of action against the officer for making a false return, we will deny you the relief sought, allow the constitution to be violated, and your property confiscated.' Fortunately, however, the authorities quoted have not been followed in this country. A contrary rule prevails, and a judgment at law may be vacated or relieved against in equity when it is made to appear that it is unjust, and that the court in pronouncing it acted without jurisdiction."

As supporting the rule, the reason for which is so ably set forth in the foregoing note, see, also, 1 Black, Judgm. §§ 376, 377; 2 Freem. Judgm. (4th Ed.) § 496; 1 High. Inj. (3d Ed.) §§ 222, 229; 1 Spell. Extr. Relief, § 138 *et seq.*; 10 Am. & Eng. Enc. Law, 907; *Crafts v. Dexter*, 42 Am. Dec. 666; *Handley v. Jackson*, 31 Or. 552 (65 Am. St. Rep. 839, 50 Pac. 915); *Moore v. Town Council*, 32 Fed. 498; *Noyes v. Hillier*, 65 Mich. 636, (32 N. W. 872); *Hamilton v. Rogers*, 67 Mich. 135 (34 N. W. 278); *Ogden v. Davidson*, 81 Va. 757; *Johnson v. Gregory*, 4 Wash. 109, (31 Am. St. Rep. 907, 29 Pac. 831); *Great West Min. Co. v. Woodmas M. Co.*, 12 Colo. 46, (13 Am. St. Rep. 204, 20 Pac. 771); *Owens v. Ranstead*, 22 Ill. 161; *Weaver v. Poyer*, 79 Ill. 417; *Magin v. Lamb*, 43 Minn. 80, (19 Am. St. Rep. 216, 44 N. W. 675); *Ferguson v. Crawford*, 70 N. Y. 253. Many more decisions might be cited which support the doctrine that a court of equity has plenary power, and ought, to enjoin a judgment at law based upon the false return of an officer, but the foregoing will serve to illustrate the wisdom of the more modern rule, which demonstrates that the action at

law against the officer is too circuitous, and often inadequate; and, such being the case, the court committed no error in permitting evidence to be introduced at the trial which tended to prove that plaintiff had not been served with the summons in the original action.

A court of equity should not set aside a judgment at law except upon clear, satisfactory, and convincing proof of a lack of service of process by the officer making the return of service, which must always be *prima facie* evidence of the material facts recited therein. *Randall v. Collins*, 58 Tex. 231; *Starkweather v. Morgan*, 15 Kan. 274; *Jensen v. Crevier*, 33 Minn. 372, (23 N. W. 541); *Wyland v. Frost*, 75 Iowa, 209 (39 N. W. 241); *Connell v. Galligher*, 36 Neb. 749, (55 N. W. 229). Without attempting to quote any of the testimony introduced at the trial, we think it sufficient to support the findings of the court, and to satisfy the requirements of the foregoing rule; and hence the decree is affirmed.

AFFIRMED.

Decided at PENDLETON, 18 August; rehearing denied 17 October, 1888.

RE PLUNKETT'S ESTATE.

FREELAND V. CUNNINGHAM.

[54 Pac. 152]

APPEALS FROM COUNTY COURT—PRACTICE.—An adjudication of a county court settling the final account of an administrator and directing the distribution of the estate, is a decree and not a judgment, and on an appeal the evidence must accompany the transcript and the case be tried anew.

IDEM.—On an appeal to the circuit court from a decree of a county court the cause is to be tried and finally settled—it may be remitted for further proceedings as directed, but not for a new trial.

IDEM.—Where a record on appeal from a county court to the circuit court fails to show all the evidence given at the trial, or the jurisdictional papers, the circuit court cannot do otherwise than dismiss the appeal for lack of jurisdiction. The fact that the parties appear, and the cause is thereupon determined, does not cure the defect.

From Morrow: STEPHEN A. LOWELL, Judge.

38	414
39	250

38	414
40	451

Judicial accounting of W. B. Cunningham, as administrator of the estate of Eliza Ann Plunkett, deceased. From a decree settling the final account, and directing payment of the funds of the estate to the county clerk, an appeal was taken to the circuit court. A decree was there made remanding the matter to the county court, and E. L. Freeland, the administrator subsequently appointed, appeals.

REVERSED.

For appellant there was a brief over the name of *Brown & Redfield*, with an oral argument by *Mr. C. E. Redfield*.

For respondent there was a brief and an oral argument by *Mr. G. W. Rea*.

MR. JUSTICE WOLVERTON delivered the opinion of the court.

This appeal is from a decree of the Circuit Court of Morrow County in the above-entitled matter, remanding the cause to the county court of said county for retrial therein. It appears that after the revocation of the letters issued to W. B. Cunningham, as administrator of said estate, the county court, on June 8, 1888, made and entered an order and decree approving and settling his final account, and directed that he pay to the county clerk the funds of the estate remaining in his hands upon such settlement, amounting to \$2,435.86. From the decree of final settlement there was an attempted appeal to the circuit court, and it seems a trial was had therein, the late Judge Bird presiding, but, owing to his illness and consequent demise, no decree was rendered by him. Thereafter the matter was again brought on for hearing upon a motion by Cunningham for an order reversing

the said decree, on the ground that the record shows the county court exceeded its jurisdiction in the premises, and upon the motion of E. L. Freeland, the administrator subsequently appointed, for its modification, by directing Cunningham to pay over the said sum of \$2,435.86 to him instead of the county clerk. There is in the record what purports to be a transcript from the county court and some testimony which appears to have been taken in said court, but there is no certificate attached, nor is there any notice of appeal, so far as the record discloses. The circuit court found that it was impossible to determine whether the evidence taken in the county court had been certified up and lost during the illness of the judge then presiding, or whether the record was ever perfected, and the question is, was there authority of law to justify the order remanding the cause for a retrial in the county court?

Subdivision 3, § 546, Hill's Ann Laws, is relied upon as conferring the authority. It reads as follows: "Upon an appeal to the circuit court, the manner of proceeding thereafter is the same as if the action or suit had been commenced in such court; but if the appeal be from a decree of the county court, the appellate court may give a final decree in the cause or matter, to be enforced as a decree of such court, or such decree as may be proper, and direct that the cause or matter be remitted to the court below for further proceedings in accordance therewith." This section, however, must be construed in connection with section 902, which provides that the provisions of title IV, chapter VI, relating to appeals, are intended to apply to judgments and decrees of the county court in all cases, but not to its decisions given or made in the transaction of county business, and section 543, which provides that, upon an appeal from a decree given in any court, the suit shall be tried anew upon the tran-

script and evidence accompanying it. The proceedings had in the county court touching the final account of the administrator were in the nature of a suit in equity, as distinguished from an action at law, and hence the appeal was from a decree, and not from a judgment. Hill's Ann. Laws, §§ 895, 1077, 1078. Such being the case, the evidence taken and submitted in that court should accompany the transcript, and the trial in the circuit court is anew upon such evidence, and not as in the case of an appeal in an action where the trial is had as if the action had been originally commenced in the latter court. Such has been the practice so far as we are aware, and is fully sanctioned by a reasonable interpretation of the sections cited.

A trial *de novo* precludes the idea of a direction to the lower court to retry the issues upon which it has once passed, and which stand for trial in the circuit court on the appeal, as the effect of such a proceeding would be to grant a new trial, which is subject matter for the court of original jurisdiction only. By intendment of subdivision 3, *supra*, the decree of the circuit court becomes final upon the matter in hand, which it may enforce through its own process, or direct that it be remitted to the county court, with directions to take such other action in the premises as may seem proper, but always in harmony with the decree of the circuit court. It does not contemplate an affirmance or reversal for errors that may appear of record, but a final adjudication touching the matter thus brought on for hearing, which may be enforced as a decree of that court, or, if remitted, controls the future proceedings of the county court.

The record fails to show whether the appeal from the county court was ever perfected or not. If it was never perfected, as a matter of course the circuit court had no

jurisdiction whatever to proceed in the premises except to dismiss the proceeding; but, if it was perfected, the papers necessary to confer jurisdiction, and part of the evidence, all which evidence is requisite to a trial *de novo*, are supposed to have been lost, and none were substituted or supplied in their stead; so there was nothing to show that the circuit court had acquired jurisdiction, and the fact that the parties appeared, and the cause was thereupon heard and determined, cannot be taken as curing the defect. *Wolf v. Smith*, 6 Or. 73. So that, in either event, the circuit court was powerless to affirm, reverse, or modify the decree of the county court, or to proceed in the premises, or do otherwise than to dismiss the appeal, and this was not asked for. The order of this court will be that the decree of the court below be reversed, and the cause remanded, with directions to take such further proceedings as may seem proper in the premises, not inconsistent with this opinion.

REVERSED.

Decided at PENDLETON, 18 August, 1898.

FRENCH v. HARNEY COUNTY.

[54 Pac. 211]

WHEN COUNTY COURT CAN CHANGE ASSESSMENT ROLL.—A county court has authority only to complete unfinished matters pending before the county board of equalization at the time of its adjournment; it has no power to change an assessment *sua sponte*.

WRIT OF REVIEW — RECORD.—Questions presented by a writ of review must be determined on the record as made by the inferior tribunal; if such record is incorrect it should have been corrected before being certified up.

From Harney: MORTON D. CLIFFORD, Judge.

Proceeding by Peter French against Harney County, its judge and commissioners to review the proceeding of

the county court changing an assessment. From an order dismissing his writ petitioner appeals.

REVERSED.

For appellant there was a brief over the names of *Thornton Williams* and *Jas. A. Fee*, with an oral argument by *Mr. Fee*.

For respondents there was a brief over the names of *Chas. W. Parrish*, district attorney, and *King & Saxton*, with an oral argument by *Mr. Parrish*.

MR. JUSTICE BEAN delivered the opinion.

On October 10, 1896, the board of equalization of Harney County, being then in regular session, directed the county clerk to issue a citation to the plaintiff, requiring him to appear before the county court at its next term, and show cause why his assessment of 8,000 head of cattle, valued at \$80,000, should not be raised to 15,000 head, of the value of \$150,000. Thereafter, and on the same day, it caused to be entered in its record the following order: "In the Matter of the Assessment Roll for the Year 1896. Now, at this time, the board of equalization having completed its labors, examined the assessment roll for the year 1896, and equalized the assessments therein, it was ordered that the board adjourn without day." On October 17th the county clerk issued a citation to the plaintiff, requiring him to appear in the county court on Monday, November 4, 1896, and show cause, if any, why his assessment should not be increased in the respect mentioned in the order of the board, in obedience to which he appeared; and after a hearing the county court found and determined that he was in fact the owner of 12,000 head of cattle in the county, liable

to assessment, and increased his assessment accordingly. To reverse and annul such order this proceeding was instituted and, it having been dismissed by the circuit court, the plaintiff appeals. His contention is that the county court was without jurisdiction to make the order increasing his assessment, because the board of equalization had, as its records affirmatively show, completed the examination and correction of the assessment roll, and equalized the assessment thereon, before its final adjournment.

By section 2778 of the Code, the judge, clerk, and assessor of the several counties of the state are made to constitute a board of equalization, "with power to examine and correct the assessment roll of their respective counties and to increase or reduce the valuation of property assessed"; and such board is required by section 2781 to continue its sittings from day to day until such examination and correction shall be completed, but, if it cannot be done "within the week in which the board is required to meet, it shall be the duty of the county court, at its next term thereafter, sitting for the transaction of county business, to complete such examination and correction in the same manner and with like effect as the board of equalization is required to do." It clearly appears from these provisions that the primary tribunal, created and constituted by law with power to "increase or reduce the valuation of property assessed," as it appears on the assessment roll, is the board of equalization, and it is only when the board is unable to complete such work within the week in which it is required to meet that the county court has any power or jurisdiction over the matter. It is not authorized or empowered to revise or review the action of the board of equalization, or to change the value of property assessed, as corrected or approved by such board. It is only when the board

has been unable to act within the specified time that the county court has jurisdiction, and then only for the purpose of taking up the unfinished work and completing it. It necessarily follows from these views that the action of the county court in increasing the plaintiff's assessment was absolutely null and void because the examination and correction of the assessment roll were fully completed before the final adjournment of the board of equalization, and therefore the court had no power or jurisdiction over the subject matter.

But it is argued that the order of the board of equalization directing the clerk to issue a citation to the plaintiff, requiring him to appear before the county court at the next term thereof, and show cause why his assessment should not be increased, indicates a purpose not to equalize the assessment of plaintiff. There might be some force in this position if the board had not subsequently entered an order reciting that it had completed its labors, examined the assessment roll, and equalized the assessments therein. This affirmative recital, subsequently made, will manifestly overcome a mere inference which might be drawn from some previous orders. It was sought also to show at the hearing of the review proceedings in the circuit court, by the affidavit of the county clerk, that the records of the board of equalization in this regard are untrue, and that in fact plaintiff's assessment was never equalized by the board. But it is a familiar principle that questions presented by a writ of review must be tried by the record of the inferior tribunal whose proceedings are sought to be reviewed, and that such records cannot be contradicted at the trial. If the record, reciting that the board had completed its work, and examined the assessment roll and equalized the assessment therein, is in fact incorrect, it should have been amended in a proper manner before it was sent up

in obedience to the writ. It cannot be done at the hearing. It follows from these views that the judgment of the court below must be reversed, and the cause remanded, with directions to vacate and annul the order of the county court increasing the plaintiff's assessment.

REVERSED.

Decided 15 August, 1898.

REYNOLDS v. JACKSON COUNTY.

[53 Pac. 1072]

1. ASSIGNMENTS OF ERROR ON REPORTER'S NOTES.—Assignments of error cannot be based on the stenographic notes of the trial taken by the reporter unless they are properly preserved in a bill of exceptions: *McQuaid v. Portland Railroad Co.*, 19 Or. 535, applied.
2. BILL OF EXCEPTIONS—JUDGMENT ROLL.—No bill of exceptions is necessary to present on appeal the propositions that the lower court was without jurisdiction and that the complaint does not state a cause of action. The judgment roll is sufficient: *State v. Mack*, 20 Or. 24, followed.
3. EXCUSE FOR FAILURE TO FILE BRIEFS.—The practice as to allowance of time for filing briefs under rule 6 should be liberal, but the fact that co-counsel, or counsel and client, were disputing as to who should print the brief will not excuse failure to comply with the rules: *Swanson v. Leavens*, 26 Or. 561, *Close v. Close*, 28 Or. 108, and *Neppach v. Jones*, 28 Or. 286, cited and applied.

From Jackson: HIERO K. HANNA, Judge.

Action by Daniel Reynolds against Jackson County, in which the former had judgment. Heard on motions to strike and to affirm.

AFFIRMED.

For the motion there was an oral argument by *Mr. J. R. Neil*.

Contra there was an oral argument by *Mr. Edward B. Watson* and *Mr. J. A. Jeffrey*, district attorney.

PER CURIAM. This appeal is prosecuted by the defendant. The plaintiff moves, upon notice to defendant, to

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133	372
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38	422
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strike from the transcript the reporter's notes of the evidence and trial in the court below, and to dismiss the appeal, for the reason that the errors assigned in the notice of appeal do not appear by bill of exceptions. At the hearing, the respondent filed another motion, to affirm the judgment appealed from, upon the ground that appellant had failed to file and serve its brief in conformity with rule 6 (37 Pac. vi.) of this court. By stipulation of the parties, both motions were heard and submitted together.

1. There being no bill of exceptions signed or allowed by the trial judge, the reporter's notes are unavailable upon which to base assignments of error on the appeal. *McQuaid v. Portland Railroad Co.*, 19 Or. 535 (25 Pac. 26).

2. But the questions presented by the demurrer, that the court is without jurisdiction, and that the complaint does not state facts sufficient to constitute a cause of action, come with the record or judgment roll, and no bill of exceptions is necessary to assign them. *State v. Mack*, 20 Or. 234 (25 Pac. 639). The motion to strike the reporter's notes from the transcript should therefore be allowed, and the one to dismiss be denied.

3. Upon the motion for judgment, it appears that the transcript was filed on the twenty-fourth of September, 1897, and the printed abstract on October 7, but that, at the time of the hearing, the appellant had not filed its brief, although much longer time had elapsed than twenty days after service of such abstract. Affidavits were filed in excuse of the default, based upon a misunderstanding or rather dispute between co-counsel touching the party who should be employed to print the briefs. While the court has been liberal, if reasonable excuse is offered, in relieving parties from default in complying with the rules adopted for the dispatch of its business,

yet, unless a good reason exists for such default, we cannot set them aside or disregard them. *Swanson v. Leavens*, 26 Or. 561 (40 Pac. 230); *Close v. Close*, 28 Or. 108 (42 Pac. 128); *Neppach v. Jones*, 28 Or. 286 (39 Pac. 999). The exculpatory facts relied upon do not furnish a sufficient excuse for the default, and the judgment of the court below will therefore be affirmed.

AFFIRMED.

Decided at PENDLETON, 13 August, 1898.

FISK v. HUNT.

[54 Pac. 660]

1. AMENDING RETURN—COMPETENCY OF IMPEACHING AFFIDAVITS.—In determining whether an officer should be allowed to amend his return of service it is proper to consider affidavits showing that it would be impossible to truthfully make a sufficient return.
2. SERVICE BY MAIL.—Under Hill's Ann. Laws, §§ 528, 529, providing that service by mail may be made when the persons for and on whom it is made reside in different places, between which there is communication by mail, such a service is ineffectual where the copy was mailed at the place of residence of the person on whom it was to be made.

From Grant: MORTON D. CLIFFORD, Judge.

Action before a Justice of the Peace by Ralph Fisk against Martha Hunt and others, in which defendants attempted to appeal. The appeal was dismissed in the circuit court and defendants again appeal.

AFFIRMED.

For appellants there was an oral argument by *Mr. Jas. A. Fee*.

For respondent there was an oral argument by *Mr. H. H. Hendricks*.

MR. JUSTICE WOLVERTON delivered the opinion.

Judgment having been obtained by plaintiff in the Justice's Court of Haystack Precinct, Grant County, Oregon, defendants appealed to the circuit court, and plaintiff moved to dismiss, for reasons, among others :

(1) That the return of the constable upon the notice of appeal was false as it respects the usual place of abode of the respondent, he being absent, and constructive service having been attempted ; (2) that the pretended service by mail was not made as by law directed ; and (3) the return does not show service within Haystack Precinct. In order to show the falsity of the return touching the residence of the respondent, he procured and had filed several affidavits contradicting it, and showing that such residence was elsewhere than as stated by the officer. Thereupon the appellants moved the court for leave to the constable to amend his return, basing the motion upon his affidavit filed therewith, and at the same time moved the court to strike out the affidavits filed by the respondent as irrelevant and incompetent to impeach the return. The court denied both the motion to strike out and for leave to amend, and granted the motion to dismiss ; and judgment having been rendered accordingly, the defendants appeal to this court.

The questions made touching the return of the constable were confessed by the motion for leave to that officer to amend the same, and therefore it becomes unnecessary for us to consider them. It is pertinent, however, for us to inquire whether the court below should not have granted leave to amend. The affidavit of the constable, upon which the motion was based, omitting formal parts, states the following : " That, immediately upon the receipt of the above-mentioned notice of appeal, I, acting in an official capacity, at once proceeded to make diligent inquiry, and using every effort in my power to find the above-named plaintiff, Ralph Fisk, for

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the purpose of serving said notice of appeal on him. I found by such inquiry and efforts that the plaintiff above named had left the neighborhood, and that it was impossible to find him in person. Then I endeavored to find his home or usual place of abode. After due and diligent inquiry, I became convinced that his usual place of abode was at the home of William Anderson, in the above-mentioned precinct, county, and state. I immediately served the notice of appeal, duly certified to by me as constable as aforesaid, at the home of William Anderson, the usual abode of plaintiff, as above mentioned, in the care of Mrs. Carrie Anderson, a white person over the age of fourteen years, between the hours of six o'clock in the morning and nine o'clock in the evening or afternoon, to-wit, about three o'clock in the afternoon on the 16th day of September, 1896, on the above day and date; and at the time I delivered said copy of said notice of appeal to Mrs. Carrie Anderson, the said Carrie Anderson, in answer to my inquiry in relation to the home or usual place of abode of the said Ralph Fisk, informed me in words to the effect that the home of William Anderson, the place where she then was, was the home of the said Ralph Fisk at that time. That, about one week after this, the said Carrie Anderson above named sent me word that her place was not the home of Ralph Fisk,—that he had gone away. I then went to said Anderson's place, and got the said copy of the notice of appeal, and took it away with me; and, after making further inquiries in relation to the whereabouts of said Fisk on the same day, I returned the said copy to the said house of William Anderson and Carrie Anderson, and this time left the same, Mr. William Anderson receiving it. The next day I made diligent inquiry, and used my best ability to find out the postoffice address of said Ralph Fisk, and found that it was Wagner, Grant County, Oregon.

I then again served the said notice of appeal, by depositing in the said postoffice at Wagner, Grant County, Oregon, a copy thereof, duly prepared and certified to by me as constable as aforesaid, in a sealed envelope addressed to the said Ralph Fisk, at said Wagner, Grant County, state of Oregon, the place of residence of the said Ralph Fisk and postoffice address, with the postage prepaid. That the above-named defendants, appellants in the above-entitled cause, and said Ralph Fisk, reside in different places in said Grant County, within fifty miles of said postoffice at Wagner; and there is a tri-weekly mail going to and from the said Wagner and Winlock, and the said Wagner is the postoffice where the said Ralph Fisk at said day and date usually received his mail, the postoffice of the defendants being said Winlock, in said county; and the affiant has ever since the date of said deposit of said copy of notice of appeal in said postoffice, so directed to said Ralph Fisk, on the 22d day of September, 1896, during postoffice hours on said day, to wit, about 3 o'clock p. m., received his daily mail at said postoffice, and said copy of said notice of appeal has never been returned."

1. The question with the court below was whether, from the showing made, the officer was able truthfully to make a good and sufficient return evidencing a valid service; for, if it had been conceived that the showing was sufficient for the purpose, we take it that the court would not have hesitated to grant the leave requested. In determining this question, we are of the opinion that it was competent for the court to take into consideration also the affidavits which had been filed by the respondent showing most positively and unmistakably that the residence of the respondent on the said twenty-second day of September, 1896, was not with William Anderson

and Carrie Anderson, his wife, or at their place of residence. Since the return made was confessedly insufficient, and the question was whether the officer should be allowed to file an amended return, the opposing affidavits were not considered as impeaching the return itself, but as controverting the officer's ability to truthfully certify a competent service by amendment. For this purpose, in so far as it pertains to facts which the officer is compelled to ascertain from others, we have but little doubt of the relevancy of the opposing affidavits, whatever might be the rule as it respects the legitimacy of the use of such documents to impeach a direct return. *Fitnam, Trial Proc.*, § 245. Aside from these affidavits, however, the showing of the constable is equivocal. He says he became convinced that the respondent's usual place of abode was at the home of William Anderson, but the result of his inquiries as disclosed by his affidavit seems to indicate that he was mistaken in that. But, upon the whole, we cannot say that the court below violated a sound and legal discretion in disallowing the motion for leave to amend. If it be questioned whether the opposing affidavits are here for our consideration in the absence of a bill of exceptions, it cannot help the appellants, because the court below evidently considered them, and the error must be made to appear upon the appeal before we can reverse.

2. It was also insisted that the constable could have made a good and sufficient return of service by mail, but the contention is not tenable. We would infer from the affidavit that the plaintiff's residence was at Wagner, while that of defendants was at Winlock,—different places within Grant County, between which there was communication by mail. But the deposit was made in the postoffice at Wagner, addressed to the respondent

at Wagner. The statute provides (Hill's Ann. Laws, §§ 528, 529) that "service by mail may be made, when the person for whom the service is made, and the person on whom it is to be made, reside in different places, between which there is a communication by mail, adding one day to the time of service for every fifty miles of distance between the place of deposit and the place of address." "In case of service by mail, the copy must be deposited in the postoffice, addressed to the person on whom it is to be served, at his place of residence, and the postage paid. The service shall be deemed to be made on the first day after the deposit in the postoffice that the mail leaves the place of deposit for the place of the address, and not otherwise." These sections provide for substituted service in derogation of the common law, and a strict and literal compliance with them is required to confer jurisdiction on the appellate tribunal. 2 Enc. Pl. & Prac. 226. Such being the case, the deposit, to have been effectual as contemplated thereby, should have been made in the postoffice at Winlock, the appellant's place of residence, they being the parties for whom service was attempted; and it was insufficient to make the deposit at Wagner, the place of residence of the party on whom the service was intended to have been made. *Reed v. Allison*, 61 Cal. 461. These considerations affirm the judgment of the court below, and it is so ordered.

AFFIRMED.

Decided at PENDLETON, 13 August, 1888.

PAYNE v. HALLGARTH.

[54 Pac. 162]

DEEDS—DELIVERY.*—Having decided to convey his property to his brother's wife as the best provision for the brother's children, deceased executed a deed one month before his death, which he knew was impending, and handed it to his sister-in-law, with the remark that he deeded her the land, and wanted it to go to the children at his death. She then returned the deed to deceased, who placed it under his pillow, and later gave it to his brother, with directions to have it recorded after his death. *Held*, a sufficient delivery: *Pain v. Smith*, 14 Or. 82; *Flint v. Phipps*, 16 Or. 437, and *Hoffmire v. Martin*, 29 Or. 240, cited.

From Union: ROBERT EAKIN, Judge.

Suit by Mary E. Payne, Sarah Gunnell, Ann Thornton, Joseph Hallgarth, and William Hallgarth against Jane Hallgarth and others. From a decree for plaintiffs, defendants appeal.

REVERSED.

For appellants there was a brief and an oral argument by *Messrs. Thos. H. Crawford, J. F. Baker and Neil McLeod*.

For respondents there was a brief and an oral argument by *Mr. John L. Austin*.

MR. JUSTICE WOLVERTON delivered the opinion of the court.

The plaintiffs, Mary E. Payne, Sarah Gunnell, Ann Thornton, Joseph Hallgarth, and William Hallgarth, and the defendant Charles Hallgarth, are the brothers

* NOTE.—Scholarly monographic notes collating and classifying the authorities on What is a Delivery of a Deed are published in 53 Am. St. Rep. 537 and 12 L. R. A. 171. Another branch of the subject is ably annotated in 49 Am. St. Rep. 219 under the title Conveyance to Take Effect After Grantor's Death.—RE-PORTER.

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and sisters and only heirs of Sibrit Hallgrath, who died intestate in Union County, Oregon, on November 21, 1893. On the twenty-first of October preceding his demise he executed and duly acknowledged a certain deed purporting to convey the premises in dispute to the defendant Jane Hallgath, and the only question involved in this suit is whether there was a delivery of such deed to the grantee to take effect presently, for it is not contended that it could have had effect otherwise. The evidence adduced at the trial is not voluminous, and we will state the substance of it.

Dr. Brownell, the family physician, testifies that on October 21, 1893, he was in attendance upon the deceased at his home, and there met Dr. Honan, of La-Grande, in consultation; that he was present when the deed was signed and witnessed, and heard the discussion preliminary thereto; that the deceased asked Dr. Honan what his chances were for getting well, and was told he would probably live a month or so, but it was thought he could not possibly get well, and that if he had any business matters to arrange he had better have them attended to right away. Witness, further testifying, says: "I told him I thought it would be better to fix matters up, and if he got well he could change it. * * * He told me that he didn't owe the people in the East anything; that he came west with but very little property, and earned all his money here in the West, and earned it by hard work, and that the property should go to Jane's children; that he loved the children, and he wanted them to have the property when he died. He seemed to be uneasy about the way to dispose of the property, so that it wouldn't tie Charlie up so that he couldn't do business, and asked what he had better do; how he had better do with it. I told him I guessed he had better deed it over to the children. Then he said he

couldn't do that very well, but would deed it over to Charlie. And then finally said 'No; he wouldn't trust Charlie, but would deed it over to Jane, and Jane could give it to the children then as they came of age.' * * * I proposed a will, and he said that if he made out a will that it would tie Charlie up so he couldn't do business, and wanted the matter fixed up so that Charlie could carry on all the business as he had done before. * * * We told Sib. that if he got well he could destroy the deed, and if he did not get well it should be given to Jane and taken care of." On cross-examination he says, in substance: The deed was to be recorded after Sib. died, and it was not to be recorded unless he did die as a result of the sickness for which he was being treated. He was to keep it, and if he died they were to record it, and if he did not die he was to do as he chose with it. He dictated what should be done. They proposed several ways, and he dictated his own way.

Jane Hallgarth testifies that she was living in the same house with deceased at the time of his death; that his last sickness continued for a year or little over, but he was confined to his room only about the last month; that she saw the deceased sign the deed, and that he handed it to her shortly thereafter; that Marsh took the deed, and when it was returned, about a couple of hours afterwards, deceased handed it to her. She further testifies as follows: "He wanted me to have his land. He said he deeded me his land because I had been good to him, and kind,—took care of him in his sickness. Q. Did he say anything about wanting it to go to your children? A. Yes, sir; at his death. Q. What did you do with the deed then? A. I handed it back to him. Q. What did he do with it then? A. He put it under his pillow. * * * Saw the deed the next day. It had been put away in a trunk. He gave it to my husband to put

away for me. Q. Why did you wait until after Sib.'s death before you sent it down to have it recorded? A. Because I didn't want the land if he got well. I wanted him to have his own property. Q. Was that the arrangement, that if he got well he was to keep it? A. Certainly, he was to keep it. Q. And if he got well, and asked you for the deed, you would have given it back to him, would you not? A. Yes, sir; I would have given it back. Q. I will ask you if when you received that deed you took it with the understanding that it was to take effect only if Sib. Hallgarth died? A. Yes. Q. And if he got well he was to have it back again? A. Yes, sir."

C. H. Marsh testifies that one of Charles Hallgarth's boys came to Elgin, and asked him to go down and draw a will for Sib. Hallgarth; that he drew the deed at the request of Sib.; that when he came into the room Hallgarth spoke to him concerning the matter, whether it would be better to make a will or a deed, and explained to him what he wanted to do with his property, and witness told him he thought it would be better to make a deed. Deceased said the matter had been talked over, and asked witness which he thought would be best, and was informed that the deed was preferable, and thereupon a description was procured, and witness drew the deed, and it was signed by deceased in the presence of witness and Dr. Brownell. The substance of the understanding he got from Sib.'s conversation was "that the deed was to be placed in the Farmers' & Traders' Bank, to be put on record if he should die, and, if not, to be returned to him." On being recalled, the following was elicited on cross-examination: "Q. I will ask you, if in your conversation with Sib. Hallgarth about what was the best instrument to carry out his purposes, if you

said to him that the deed could be made, and if made to be recorded after his death he could keep possession of the land until his death, and could control it by being able to recall the deed and destroy it, in case he got well.

A. I did. That was his understanding, or, at least what his questions to me and answers to me indicated. Q.

And the reason that you recommended it in that way?

A. Yes, sir. Q. I will ask you if in that conversation he said to you that he wanted Jane and her children to have the property in case he died, but wanted to keep control of it if he got well. A. The children, so far as I

remember, were not mentioned in there. He wanted the real estate to go to her. He might have mentioned for the benefit of the children, or something that way, but the real estate was to go to her. I don't remember that he said that he could recall or destroy the deed, or anything that way, or that he would keep possession; but, as near as I remember, his words were something similar to this: 'I want the property so if I don't die, or if I get well, that I can have it back again.' "

Dr. M. F. Honan testifies "that he was called in consultation with Dr. Brownell; that, after examining his patient, he told him he did not think he could get well, and that he could not live longer than about four weeks; that after dinner he saw Hallgarth privately, who told him he felt under no obligations to his other relatives; that what he had Charlie Hallgarth, his brother, and he had made together, and that he wanted Charlie's children to get the benefit of it. A deed to Charlie, then a deed of trust to him, were discussed, but he finally concluded to deed it to Charlie's wife, believing that he could trust a mother to take proper care of her children. When this was concluded, Hallgarth called Charlie in, and told him that he had made up his mind what he was going to do, and instructed him to 'have Marsh come up

prepared to make a deed.' ” Witness, continuing, says : “ The understanding with Sib. was — I reasoned with him in this way : I says, ‘ After you make this deed out, put it up in escrow in the bank. ’ Q. You say that you suggested the deed should be sent to the bank or some place in La Grande, to be left in escrow ? A. Yes. Q. Did he express his intention of doing so ? A. No ; he didn’t express any intentions of doing anything particularly. He simply wanted to talk to me as a friend about the matter, and see what suggestions I could make to him, and he appeared to think that a suggestion of a deed to Mrs. Hallgarth, and holding the deed himself until after his death, or placing it where it could not be placed on record until after his death, was the very thing he was going to do. Q. That was the plan that was discussed between you and him ? A. Yes, sir. Q. This matter of placing the deed so that it could not be put on record, — I presume his intention in that was so that in the possible event of his getting well that he could recall the deed ? A. So that he could recall the deed. ”

John Ross, being called as a witness, says that he was a nurse in attendance upon Sibrit Hallgarth in his sickness ; that when the deed was witnessed Marsh took it to see if it was correct, and when it came back “ Sib. ” handed the deed to Charlie, and said, “ Charlie, take this, and put it away, and take care of it. ”

Charles Hallgarth testifies that Sibrit was his brother ; that they were partners in business, and that Sib. had never been married ; that he had made his home with witness’ family ever since 1868, and that he desired all of his property to go to witness’ wife and children ; that they had been kind to him, and for this reason he wanted them to have it, and to effect the purpose the deed was made ; that he did not want to tie witness up in his business, but wanted him to carry it on without interrup-

tion, the same as he had always done; that after the deed had been returned from Elgin it was placed under Sib.'s pillow, and when witness went into the house he said to him, "Here is the deed under my pillow; I want you to take that, and take care of it until after my death, and then have it recorded"; that he did not mention the children in that connection, as the deed was made out to his wife; that he took the deed, and took care of it, and had it recorded as directed. On cross-examination: "Q. You say that he expressed a desire that the property—all of his property—should go to Jane and the children? A. Yes; he so expressed himself. Q. Did he express that he wanted them to have it after his death? A. After his death, of course. He didn't want them to have it before his death. He didn't know but he might get well. He didn't so state. But he wanted Jane and the children to have all the property after his death. Q. And that was why it was stated, when the deed was made, that it was not to be recorded until after his death? A. That was the understanding,—that they gave me the deed to take care of. He took it from under his pillow, and says, 'You take this, and take care of it'; and he says, 'After my death, have it recorded.' Q. If he had got well, and wanted it back, would you have given it back to him? A. Certainly we would; yes, sir. Q. If Sib. had asked for the deed before he died, would you have given it back to him? A. Yes, sir. Q. You say it was handed to you to hold until his death, and then to be recorded. I will ask you if, when you took that deed, you understood that prior to his death—up until the time of his death—that Sib. should have the control of it. A. No, sir; he never made any such suggestions to me as that. He gave it to me without any conditions, voluntarily. * * * It was given to me by Sib. himself, voluntarily, as I told you, without any

understanding that it should be given back to him or anything of the kind. He never said a word to me in regard to that. Everything was done, as I have told you, voluntarily.”

Delivery is the final and conclusive act in the execution of every deed, as it marks the time when the *locus pœnitentiæ* in either party is precluded and the title has passed. A delivery is effected either by a manual transfer of the deed from the grantor to the grantee, or to some third party for his use, or by the doing of some act, or saying something, or by both, whereby the grantor manifests an unequivocal intention to surrender the instrument so as to deprive himself of all authority over it or of the right to recall it, and to consummate the conveyance: *Fain v. Smith*, 14 Or. 82 (58 Am. Rep. 281, 12 Pac. 365); *Flint v. Phipps*, 16 Or. 437 (19 Pac. 543); *Brown v. Westerfield*, 47 Neb. 399 (53 Am. St. Rep. 532, 66 N. W. 439); *King v. Carpenter*, 37 Mich. 364, 368; *Martin v. Flaharty*, 13 Mont. 96 (40 Am. St. Rep. 415, 19 L. R. A. 242, 32 Pac. 287); *Doe v. Knight*, 11 E. C. L. 632; *Burnap v. Sharpsteen*, 149 Ill. 225 (36 N. E. 1008); *Provart v. Harris*, 150 Ill. 40 (36 N. E. 958).

In the light of this understanding of what is requisite to the act of delivery, we will examine the testimony, which will entail some recapitulation, and determine the effect of the transaction which is the subject of controversy. There are several material facts relating to it which it must be conceded have been established: (1) The deceased had fully determined in his own mind to invest Jane Hallgarth, the wife of Charles Hallgarth, with the title to his property, believing that she could be trusted to give it to their children as they came of age; (2) He had definitely concluded that a deed should be employed as the means or instrumentality for making the transfer. His reason therefor was that, having been

in co-partnership with his brother, he did not want to tie him up or incumber him in his business with a settlement in the probate court; (3) The deed was not to be recorded until after his death. Beyond this, it may be regarded as proven that, before he attempted to arrange for the final disposition of his property, he had fully concluded that he could not recover from his illness, and that life with him was of short duration. Drs. Brownell and Honan both testify that he first made the inquiry of them touching the subject, and was informed that he could not survive longer than about a month, and his brother testifies that "he was satisfied he was going to die; no possible show for him to live." It was this condition of his health that caused him to attempt a final adjustment of his business affairs.

Now, as it pertains to a delivery of the deed. Brownell says: "We told Sib. that, if he got well, he could destroy the deed, and if he did not get well it should be given to Jane, and taken care of." On the cross-examination he says: "The deed was to be recorded after Sib. died, and it was not to be recorded unless he did die. He was to keep it, and if he died they were to record it, and if he did not die he was to do as he chose with it." The substance of the understanding that Marsh derived from Sib.'s conversation was "that the deed was to be placed in the Farmers' & Traders' Bank, to be put on record if he should die, and if not to be returned to him." As near as he could remember, the deceased's words were something like this: "I want the property so if I don't die, or if I get well, I can have it back again." Dr. Honan says he advised him in this way: "After you make the deed out, put it up in escrow in the bank." Later he says, in effect, that it was the purpose of the deceased in not having the deed recorded to so place it that he could recall it in the event of his

getting well. None of these three witnesses, however, saw the transaction closed. The understanding of two of them was that the deed was to be placed in the bank, —as one of them expressed it, in escrow,—and of the other that deceased was to keep it, and it was not to be recorded until he died. Subsequent events show that he did differently from what either of these witnesses understood he intended doing. Brownell says: "He dictated what should be done. They proposed several ways; he dictated his own way." And Honan says: "He didn't express any intention of doing anything in particular." So, it is apparent that, while he was seeking the advice and opinions of others touching the settlement of his business and the disposition of his estate, he was exercising his own ideas, and depended largely upon his own judgment for its final accomplishment.

Marsh says he advised him that the deed was the preferable instrument to employ, as he would be able to control it, and to recall and destroy it, in case he recovered. But he had made up his mind to make a deed before he sent for Marsh, and he sought his opinion after he came as to the effect of placing it in the bank subject to recall by him, and, if not so recalled, to be recorded after his death; and Marsh thought such a transaction would pass the title at his death, and he was impressed by Sib.'s conversation with the idea that he intended thus to dispose of the deed. Marsh took the deed to Elgin to attach his notarial seal, and neither he nor Honan saw it afterwards. Brownell thinks that when it was returned the deceased put it under his pillow, and this brings us to the time of its final disposition. Mrs. Hallgarth testified that when the deed was returned deceased handed it to her, and said, in effect, that he deeded her his land, and wanted it to go to her children at his death, and then that she handed the deed back to him,

and he put it under his pillow. Later she says, "He gave the deed to my husband to put away for me," but her understanding of the arrangement was that if he got well he was to keep it. Ross saw Sib. hand the deed to Charlie, and heard him say: "Charlie, take this, and put it away, and take care of it." Charles Hallgarth testified that he said: "Here is the deed, under my pillow. I want you to take that, and take care of it until after my death, and then have it recorded." He further testified that, if Sib. had asked for the deed prior to his death, he would have given it back to him, but that there was no suggestion made whatever that Sib. should in the meantime have control of the deed; that it was given to him by Sib. voluntarily, without any conditions or understanding that it should be given back to him or anything of the kind.

As we have seen, the intention of the grantor should prevail, and it will determine the question of delivery. If he had pursued the course which Brownell, Honan, and Marsh say his conversation indicated that he intended to, it is plain a delivery would not have been accomplished, for the reason that he would have retained the power of recalling the instrument, and title could not have passed. But, if it ever was his intention to deposit the deed in the bank subject to his subsequent directions, he abandoned it; for he finally placed it in the hands of Charles Hallgarth, his brother and partner in business. His conversation prior to this time would seem to indicate that it was his purpose to retain control of it, and that it should not pass from him absolutely while he lived. The fact, however, that he handed the deed to the grantee, with a direct assertion that he deeded her his land, is of much significance, and is indicative of a present transfer. True, she returned the deed, and the purpose of its return is not fully explained.

Later, he handed it to Charles Hallgarth, with the direction that he should take care of it until after his death, and then have it recorded. The instruction was direct, plain, and specific. There was no alternative condition imposed, and the transaction at that specific juncture would indicate that the deceased supposed he had done an act which constituted a final adjustment of his business affairs, and that nothing else was necessary upon his part for its complete accomplishment. Such a delivery to Charles Hallgarth, as his agent, would have been perfectly consistent with the idea of recalling the deed at any time he saw fit, but, if otherwise, the directions would be indicative of an absolute delivery. There are some things to induce the belief that he was dealing with Charles as his agent. Charles was his partner in business, and a person in whom he apparently had full confidence, and he did not wish to tie him up by entailing a settlement of his estate in probate ; so it is perfectly consistent with the idea of recalling the deed at his pleasure that he should place it in the hands of Charles as his agent.

Mrs. Hallgarth, however, testifies that he delivered the deed to Charles to put away for her, and this is consistent with the idea of a delivery of the deed at the time he handed it to her, remarking, in substance, that he deeded her his land. Mrs. Hallgarth seemed to think the understanding was that the deed was to take effect only in case of Sib. Hallgarth's death, but there was some confusion in her mind about it, while Charles says it was delivered to him without any attendant conditions except the direction that he take care of it and have it recorded after his death. When asked if he would have returned the deed to Sib. if he had recovered and wanted it back, he answered that he would ; but what he would have done under contingencies that did not arise is sig-

nificant only of the feeling that the parties entertained for each other, and not that he was under any obligation to do so. It may have been that, if Sib. had recovered, Charles and wife would have been willing to reinvest him with the property. But there was no recovery, and the deceased was satisfied at the time that he could not get well. The contingency of getting well was very slight in his mind, and it is not altogether apparent that it was seriously considered as a factor in the transaction. He never said a word about the deed subsequently, nor did he assert ownership or control over the property in any form, but, on the contrary, treated the transaction as accomplishing the final adjustment of his business affairs. While his intention is not entirely clear, from the surrounding and attendant circumstances, and from what he himself said and did, we are forcibly impressed that the act of handing the deed to Mrs. Hallgarth, and the attendant expression that he deeded her his land, evinced a purpose to effect a present delivery; and that his subsequent act of placing the deed in the care of Charles, to be recorded after his death, was for her use and benefit, but with a design to place it within the power of Charles, in obedience to the wish of the deceased, to protect it from record until after his death. We are impelled, therefore, to hold that an absolute delivery of the deed was accomplished, which took effect at the instant of delivery. For cases of some analogy in support of the holding, see *Hoffmire v. Martin*, 29 Or. 240 (45 Pac. 754); *Brown v. Westerfield*, 47 Neb. 399 (53 Am. St. Rep. 532, 66 N. W. 439); *Hinson v. Bailey*, 73 Iowa, 544 (5 Am. St. Rep. 700, 35 N. W. 626); *Bury v. Young*, 98 Cal. 446 (35 Am. St. Rep. 186, 33 Pac. 338); *Trask v. Trask*, 90 Iowa, 318 (48 Am. St. Rep. 446, 57 N. W. 841); *Sneathen v. Sneathen*, 104 Mo. 201 (24 Am. St. Rep. 326, 16 S. W. 497).

This requires a reversal of the decree entered in the court below, and a dismissal of the complaint; and it is so ordered.

REVERSED.

Decided at PENDLETON, 13 August; rehearing denied 17 October, 1898.

FARMERS' BANK v. KEY.

[54 Pac. 206]

1. APPEALABLE ORDER.—An intermediate order dissolving an attachment is not appealable. *Van Voorhies v. Taylor*, 24 Or. 247, followed.
2. APPEAL FROM ONLY PART OF JUDGMENT.—A law judgment is not severable, so that if a party wishes to appeal at all he must appeal from the entire judgment, and the supreme court, under sections 544 and 545 of Hill's Ann. Laws, can make such orders as may be appropriate concerning both final and interlocutory proceedings. *Van Voorhies v. Taylor*, 24 Or. 247, and *Bush v. Mitchell*, 28 Or. 92, applied.

From Umatilla: STEPHEN A. LOWELL, Judge.

Actions by the Farmers' Bank of Weston against H. Key, and against H. & J. H. Key on promissory notes. Plaintiff appeals from the judgments entered.

DISMISSED.

Messrs. Stillman & Pierce for appellants.

Messrs. Carter & Raley for respondents.

MR. JUSTICE BEAN delivered the opinion.

In January, 1897, the plaintiff brought an action against the defendants Key to recover upon a promissory note. A writ of attachment was issued, and certain shares in the capital stock of plaintiff, owned by the defendants, were attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the plaintiff's cashier and secretary. On June 14, 1897, the attachment was, on motion of the defendants, dis-

solved by the court below, on the ground that the plaintiff could not be garnished in an action brought by itself. On the 2d of July the plaintiff moved to vacate and cancel such order, and on the 9th of the same month moved for a judgment by default against the defendants, and for an order for the sale of the attached property. On July 26th the court overruled the motion to vacate, and so much of the motion for a default as prayed for an order for the sale of the attached property; but in all other respects the latter motion was allowed, and a judgment entered accordingly for the amount prayed for in the complaint.

On December 13, 1897, the plaintiff attempted to appeal by serving and filing a notice, which, after the venue, title, and address to the defendants and their attorneys, is as follows: "You will please take notice that the above-mentioned plaintiff appeals to the supreme court of the state of Oregon from that judgment and order entered in the circuit court of the state of Oregon for Umatilla County, in the above-entitled action, on the fourteenth day of June, A. D. 1897, which judgment and order is in form and words substantially as follows, towit: 'It is therefore now here ordered by the court that all the shares of capital stock of the Farmers' Bank of Weston mentioned in the sheriff's return, and in the return of C. M. Pierce, cashier and secretary of the Farmers' Bank of Weston, aforesaid, on the writ of garnishment and writ of attachment, to which said writ of garnishment is attached, be, and the same are hereby, released from any and all lien or supposed lien of attachment and garnishment in this action, and as to said shares of stock the attachment and garnishment of plaintiff is hereby dissolved, but no further.' And from that part of the judgment and order of the circuit court of the state of Oregon made and entered in the above-

entitled action on the twenty-sixth day of July, A. D. 1897, in form and words substantially as follows, towit: 'It is considered, ordered, and adjudged: (1) That the motion filed herein on the second day of July, A. D. 1897, and moving the court to set aside and vacate the certain order of this court made herein on the — day of June, A. D. 1897, directing that certain shares of the capital stock of the Farmers' Bank of Weston should be released from any and all lien of attachment and garnishment in this action, is overruled and denied. (2) It is further ordered and adjudged that that part of the motion herein filed on the ninth day of July, A. D. 1897, asking for an order for the sale of property heretofore attached by garnishment herein, towit, certificates numbered 40 and 59, of the face value of \$1,000 each, and of the aggregate value of \$2,000, of the capital stock of the Farmers' Bank of Weston, is overruled and denied.' And you are hereby notified that said plaintiff hereby appeals from the whole and every part of each of said orders and judgment, and upon this appeal the plaintiff relies upon the following errors, towit: [Setting out as error (1) the order of June 14, 1896, dissolving the attachment; and (2) the order of the court of date July 26, 1897, overruling the plaintiff's motion to vacate the former order, and refusing to direct a sale of the attached property]."

The defendants now move to dismiss the appeal, and, in our judgment, the motion must be sustained, because: First, the order of June 14, 1897, dissolving the attachment, is not an appealable order (*Van Voorhies v. Taylor*, 24 Or. 247, 33 Pac. 380); and, second, the remaining portion of the notice is an attempt to appeal from a portion only of an entire judgment at law,—a proceeding unauthorized by our statute. The judgment rendered by the circuit court in favor of the plaintiff is an entirety,

and the plaintiff cannot sever it, leaving the portion favorable to itself in force in the circuit court, and appeal from the remainder. The statute does not authorize the review by the appellate court of such a judgment by piecemeal. The appeal must bring up the whole judgment, in order to give the court jurisdiction over any part of it. On such an appeal the court may reverse, modify, or affirm the judgment appealed from in the respect mentioned in the notice, and may also review any intermediate order involving the merits, and necessarily affecting the judgment: Hill's Ann. Laws, §§ 544, 545. The proper practice in the case at bar would have been for the plaintiff to have appealed from the whole of the final judgment in the court below, assigning as error the intermediate order dissolving the attachment, and the refusal of the court to order a sale of the attached property in the judgment, and any other alleged error upon which it expected to rely on such an appeal. But it cannot give this court jurisdiction to review that portion adverse to it without appealing from the whole judgment: *Crawford v. Roberts*, 8 Or. 325; *Sheppard v. Yocum*, 11 Or. 234 (3 Pac. 824); *Van Voorhies v. Taylor*, 24 Or. 247 (33 Pac. 380); *Bush v. Mitchell*, 28 Or. (92 41 Pac. 155); *Barkley v. Logan*, 2 Mont. 296. It follows that the appeal must be dismissed, and it is so ordered.

DISMISSED.

Decided at PENDLETON, 13 August; rehearing denied 17 October, 1888.

STUBBLEFIELD v. IMBLER.

[54 Pac. 198]

CONTRACTS—STATUTE OF FRAUDS.—A memorandum signed by two parties reciting an agreement by the party of the first part to deliver certain pasture land to the party of the second part, and an agreement by the latter that the party of the first part can have the use of a specified pasture, is not invalid on the ground that it is merely an unaccepted offer by the party of the first part. By signing it both parties became bound by its terms to give and take as therein provided.

From Wallowa: ROBERT EAKIN, Judge.

Action by Wm. K. Stubblefield against A. E. Imbler for damages for breach of a contract. Judgment for plaintiff and defendant appeals.

AFFIRMED.

For appellant there was an oral argument by *Mr. D. W. Sheahan*.

For respondent there was an oral argument by *Mr. Jas. A. Fee*.

MR. JUSTICE WOLVERTON delivered the opinion of the court.

This is an action based upon a writing, of which the following is a copy: "Imnaha, April 20th, 1895. I, William K. Stubblefield and Mickle Stubblefield, parties of the first part, and Dishman Bros. and A. E. Imbler, parties of the second part, do enter into the following agreement, towit: We, William K. Stubblefield and Mickle Stubblefield, parties of the first part, do agree to deliver all our range inclosed in pasture on Horse Creek, of Wallowa County, Oregon, to the parties of the second part, except the land now inclosed for farming purposes, for the consideration of \$100.00 per year for the period of two years, commencing at the date of this agreement and ending April 20th, 1897, the same to be paid on or before October 1st, of each year; and, further, we, the parties of the first part, agree to deliver to the parties of the second part during said time all the hay that we raise each year on our bench land, except what is required to fill our log barn full and eleven tons additional, all to be well stacked, for the consideration of \$10 per ton, on or before October 1st of each year (the hay to be

measured thirty days after stacking). We, the parties of the second part, do agree that the parties of the first part can have the use of the big pasture for their home stock. Witness our hands and seals. Mickle Stubblefield. [Seal.] W. K. Stubblefield. [Seal.] A. E. Imbler. [Seal.] Dishman Bros. [Seal.]” It is alleged that defendants accepted said contract, and complied with its terms and conditions as it pertains to the first year’s use of the range and hay product from the bench land, but that they refused to accept the pasturage or the hay raised by plaintiff upon said bench land for the second. Relief is prayed accordingly, and recovery had by plaintiffs.

The sufficiency of the complaint was challenged by demurrer, and the only question here arises upon the court’s action in overruling the same. Two points are urged in support of the demurrer : (1) That the contract does not fulfill the requirements of the statute of frauds, in that it does not state the agreement of the defendants ; and (2) that it lacks in mutuality. The latter is comprehended by the first, for, if the contract states an agreement on the part of the defendants, then it is mutual, as it clearly expresses an undertaking on the part of the parties of the first part. The argument is that the writing contains merely an offer on the part of the plaintiffs, which is not binding upon the defendants until accepted by them ; but the complaint alleges that they accepted the contract. If such is the case, whether verbally or in writing, there was a valid contract between the parties, and the only question is whether it is provable in court under the statute of frauds and perjuries as against the defendants. It is said : “The memorandum must show agreement on the part of the party sought to be charged ; that is, it must show a concluded contract in so far as he is concerned” : Clark,

Cont. 117. Chief Justice SHAW says: "The contract or memorandum must express the substance of the contract with reasonable certainty either by its own terms or by reference to some other deed, record or other matter from which it can be ascertained with like reasonable certainty. The statute is intended as a shield. No particular forms are required, and it looks at the substance of the contract. It requires a note or memorandum of the contract, not a detail of all its particulars: *Atwood v. Cobb*, 16 Pick. 227 (26 Am. Dec. 657).

In an early case in Massachusetts assumpsit was declared against the purchasers of cotton, and the following memorandum was offered, and held sufficient under the statute to charge them with the price, viz.:

"Hartshorn and Arnold, of Providence. December 13, 1813. I sold to the above gentlemen 39 bales upland cotton, at 40 cents,—60 days for approved security. Silas Penniman.

"Bill to be made out in the names of Hartshorn & Arnold, Weeden & Billings, and Andrew Taylor."

It was proved that the portions of the memorandum appearing in italics were in the handwriting of Hartshorn, and the remainder in the handwriting of Penniman, the plaintiff. PARKER, C. J., delivered the opinion of the court, and held the memorandum sufficient to bind the defendants, and as it respects the question of mutuality he said: "It is also said that the memorandum is defective, because it does not appear that the obligation was mutual, no counterpart being signed by the vendor, and no legal means of enforcing the bargain against him existing. But this objection has no weight. The bargain was undoubtedly mutual, although the parties might not have been equally vigilant in obtaining the legal written evidence to prove it. The defendants were

the party to be charged by the memorandum, and it is signed by them. They should have taken care to have procured one from the other party.. Indeed, it cannot be ascertained from the facts reported that they have not such a memorandum. In the case before referred to it was settled that the signature of one of the parties was sufficient to charge him :'' *Penniman v. Hartshorn*, 13 Mass. 87, 90. See, also, *Egerton v. Mathews*, 6 East, 307, referred to in the opinion.

In *Johnson v. Dodgson*, 2 Mees. & W. 653, the defendant wrote the following memorandum in a sample book of his own, and retained it in his possession, viz.: "Leeds, 19th October, 1836. Sold John Dodgson, 27 pockets Playsted, 1836, Sussex, at 103s. The bulk to answer the sample. 4 pockets Selme, Beckley's at 95s. Samples and invoice to be sent per Rockingham coach. Payment in bankers' at two months. Signed for Johnston, Johnston & Co. D. Morse,"—and it was held sufficient to bind him under the statute of frauds. To the same effect, see *Salmon Falls Manufacturing Co. v. Goddard*, 55 U. S. (14 How.) 446; *Drury v. Young*, 58 Md. 546. Within the range of these authorities the memorandum in question would appear to be quite sufficient. It shows with definiteness and particularity the agreements of the parties, and is signed by defendants, the parties to be charged. For what purpose did they sign the agreement if it was not that they intended to be bound by it? Such is certainly the legal effect, and it fills the requirements of the statute of frauds.

AFFIRMED.

Decided 18 April; rehearing denied 20 June, 1898.

PERHAM v. PORTLAND ELECTRIC CO.

(40 L. R. A. 799; 53 Pac. 14.)

38	451
42	333
38	451
43	9

ACTION FOR DEATH BY WRONGFUL ACT.—The right conferred by sections 369 and 371, Hill's Ann. Laws, permitting a personal representative to maintain an action for decedent's wrongful death is an entirely new one conferred by the statute, and is based on the death of the injured person, not on the injury that caused it, so the right of action exists though the decedent may have been instantly killed.

DEATH BY WRONGFUL ACT—WANT OF RELATIVES.—The fact that there are no surviving relatives or creditors of a person killed by a wrongful act or omission does not preclude a right of action by the personal representatives under Hill's Ann. Laws, §§ 369, 371, making the recovery assets of the estate.

NEGLIGENCE IN PLACING ELECTRIC WIRES.—The owner of electric wires carrying a dangerous current is chargeable with negligence in stringing them over a bridge so near the top of it that it is impossible to make repairs on the bridge without coming in contact with them.

IDEM.—A workman engaged in repairing a bridge over which electric wires with an apparently safe insulation are strung, where he must come in contact with them in performing his work, has a right to assume that contact with them will not be dangerous.

IDEM.—Placing electric wires known to be dangerous at a place where others are lawfully entitled to be constitutes negligence.

ELECTRIC WIRES—IMPERFECT INSULATION.—The apparent perfect insulation of electric wires, which is calculated to deceive and to cause one unfamiliar with the facts to suppose them safe, when the wires are placed where persons in the performance of their duties may come in contact with them, amounts to an invitation to them to risk contact therewith.

QUESTION FOR JURY—CARE TO AVOID INJURY.—Whether a person exercised due care to prevent injury from electric wires is a question for the jury.

HARMLESS ERROR.—In an action for negligently causing death, a refusal to charge that exemplary damages cannot be recovered is harmless where none were asked.

INSTRUCTION TO JURY.—Verbal inaccuracy of a charge to the jury will not require a reversal, if the charge as a whole fairly and accurately presents the law applicable to the facts.

CARE REQUIRED OF ELECTRIC COMPANIES.—The care demanded of electric companies must be commensurate with the danger, and, where the wires carry a highly dangerous current of electricity, the law requires the utmost degree of care in the construction, inspection and repair of the wires so as to keep them harmless at places where persons are liable to come in contact with them.

WITNESS' FEES AND MILEAGE AS COSTS.—A party who is entitled to his costs may recover as disbursements the mileage and per diem of a material witness, residing in the state, who attended the trial at his request, but without having been served with a subpoena.

From Multnomah : E. D. SHATTUCK, Judge.

Action by W. T. Perham, as administrator of the estate of N. C. Perham, deceased, against the Portland General Electric Company, which resulted in a judgment for \$4,500 in favor of plaintiff.

AFFIRMED.

For appellant there was a brief and an oral argument by *Messrs. Frederick V. Holman, Richard Williams and Emmet B. Williams.*

For respondent there was a brief and an oral argument by *Messrs. Harry Wildey Hogue, William Wallace Thayer and Sanderson Reed.*

♦MR. JUSTICE BEAN delivered the opinion of the court.

This action is brought under section 371 of Hill's Ann. Laws to recover damages for the death of plaintiff's intestate, caused by the alleged negligence of the defendant company. The facts, which are practically undisputed, are that on September 27, 1893, the plaintiff's intestate, an employee of the East-Side Railway Company, a corporation owning and operating a suburban railway between Portland and Oregon City, was killed while engaged in repairing its bridge across the Clackamas River by coming in contact with wires owned and used by the defendant company for the transmission of electricity from its station in Oregon City to its customers in the City of Portland, and which were suspended over and horizontal with such bridge. This bridge is described by the witnesses as a Howe truss with half-hip connections, 22 feet wide, and the distance between the top and bottom chords is 35 feet. Near the ends of each top chord are four vertical iron rods with nuts and

washers, connecting the top and bottom chords, and the top chords are connected together by 6x8 lateral braces set on edge, crossing each other in the shape of the letter X, and also by iron rods, about an inch in diameter, at either extremity. The main end braces of the bridge run from the ends of the top chords to the outer ends of the bottom chords at an angle of 45 degrees, and are connected together by cross braces similar to the top lateral braces, and also by two timbers 5½ by 9½ inches, called "strut braces," placed horizontally above and below the cross braces. The upper strut brace is 4½ inches below the under side of the top chord, or 20½ inches below the upper surface thereof, and the most southerly lateral rods connecting the top chords of the bridge is 22 inches north thereof, and 13 inches higher than its upper surface. Under a license from the railway company, the defendant had, at the time of the accident, 10 wires strung lengthwise and 35 inches above the top of the bridge, which were attached to pins in cross braces or arms extending from one side of the bridge to the other, and supported by standards resting on the top chords. The wires were placed 1 foot apart, except the two on the west side, between which there was a space of 2 feet.

On the fifteenth of September, 1893, the railway company sent a gang of men under charge of a foreman to repair the bridge, and they were engaged in such work until some time in the following month. While thus engaged, it became necessary to tighten the nuts on the vertical rods connecting the top and bottom chords, and, as this could not be done on the south end of the bridge without moving the arm or brace to which the electric wires were attached, the foreman telephoned, on the morning of the twenty-seventh of September, to the office of the railway company in Portland, asking that a

lineman be sent out to detach the wires, so that the arm could be moved, but, as the company neglected to do so, he concluded to go on with the work and do the best he could. He thereupon directed the deceased and three other workmen to go up on top of the bridge and tighten the nuts on the rods with a large wheel wrench 7 feet and 8 inches in diameter. The wheel part of this wrench was some 15 or 16 inches above the socket which fitted on the nut, and the wrench was operated by workmen sitting outside of the wheel on the chords or braces of the bridge, or boards placed thereon. Before working in and among the wires, the workmen examined them, and, finding that they were covered with the insulating material in common use, and that such covering was unbroken, and apparently in good condition, and receiving no injurious effect from handling them, concluded that they were safe. At the time this examination was made the wires were what are called "dead wires," as the electric current was shut off about 8 o'clock in the morning and not turned on again until about 4 in the afternoon, but of this fact the workmen were ignorant, and they supposed and believed that the wires were live wires all the time, and that the reason they were harmless was because of the insulation. Along in the afternoon, the deceased and his fellow workmen, having completed the work at the north end of the bridge, proceeded to the south end for the purpose of tightening the rods on that end, but, being unable to place the wheel wrench on the nuts because of the standard which supported the cross bar to which the wires of the defendant company were attached, they were directed by the foreman to move it out of the way. At this time the two wires on the west side of the bridge were live wires, but this fact was unknown to the workmen. They proceeded to detach a sufficient number of the wires, beginning at the east side

of the bridge, to enable them to move the east end of the south standard or support a sufficient distance north to permit the use of the wheel wrench; and after taking out the lag screws, which fastened the standard to the top chord, the deceased was directed by the foreman to cross over to the west side of the bridge to a hand line and draw up the tools necessary to be used in fastening the standard out of the way of the wrench. In obedience to this order, he started to walk over on one of the top lateral braces, stepping over the wires and steadying himself by touching them with his hands, and when he reached the two west wires, which were carrying at that time 5,000 volts of electricity, he accidentally took hold of both wires at the same time, and the entire force of the current passed through his body, killing him instantly.

The complaint alleges: That at the time the defendant so placed its wires over the bridge of the railway company it well knew it would be necessary from time to time for such company to cause the bridge to be repaired, and for persons to work upon the top chords and braces thereof; but, notwithstanding such knowledge, it carelessly and negligently strung its wires only $2\frac{1}{2}$ feet above such chords and braces, and in such a manner that it was not possible or practicable for persons to work upon such bridge without coming in contact with and handling the same; and that it carelessly and negligently failed and omitted to protect or cover the wires, and particularly the two west ones, with safe or sufficient insulating material, and that it carelessly and negligently permitted the covering used thereon to become worn, defective, and wholly insufficient to render them safe to persons coming in contact therewith; that it knew the bridge was being repaired during all the times referred to, and particularly on the twenty-seventh day of September, and that it

might be necessary at any time between the hours of 7 o'clock in the morning and 5:30 o'clock in the afternoon of that day for the workmen to move about among and come in contact with its wires, and that it was not possible or practicable for them, nor for anyone, to go upon or work upon the top chords or the top lateral braces without so doing; and that it also knew that the deceased was engaged in the work of tightening the vertical rods during the afternoon of the 27th, and that he was necessarily moving about among and coming in contact with and handling the wires, but that, notwithstanding such facts, it carelessly and negligently caused and permitted a high and dangerous current of electricity to be turned into the two wires nearest the west side of the bridge at about 4:20 o'clock in the afternoon, without notice or knowledge to the deceased or any of his fellow workmen; and that the deceased, while engaged in the performance of his duties and exercising due care and caution, and without any fault on his part, came in contact with said wires, and was instantly killed; that all the workmen on the bridge, including the deceased and foreman, thought and believed it was perfectly safe for them to move about among and touch and handle the wires referred to, because the same seemed to be insulated, but they had no knowledge of the time the current was turned into the wires, but thought and believed they were charged with electricity and were live wires at all times. Then alleges the appointment of the plaintiff as administrator of the estate of deceased, and upon the question of damages avers: "That said Nathaniel Carl Perham at the time of his death was twenty-five years and six months old, unmarried, strong, healthy, temperate, industrious, frugal, of good intelligence and business capacity, and was a skillful carpenter and bridge carpenter and contractor, and was earning and receiving

wages at the rate of \$3 per day, and would, if he had continued to live during the ordinary period of life, have continued to earn and receive the same and even greater wages for his services, and would have accumulated property and estate to the present value of \$20,000, and that by reason of his death, occasioned by the negligence and wrongful acts and omissions of the defendant, as hereinbefore set forth, plaintiff, as administrator of said estate, has been injured and damaged in the sum of \$20,000;" and prays for judgment against defendant for the sum of \$5,000 being the limit of a recovery permitted by the statute.

The defendant, by its answer, admits that at the time it placed its wires on and along the bridge in question it knew that it would be necessary to repair the bridge from time to time, and that in doing so persons would be required to go and be upon the top chords and top lateral braces thereof, but it denies that its wires were so placed that it would be necessary for such persons to come in contact therewith, or move about among or handle the same, or that it failed or omitted to protect or cover its wires with proper or sufficient insulating material, or that it permitted the covering used to become worn or defective. But it alleges that it is impracticable to insulate wires carrying such a high voltage as was carried over the wires in question so that they will not be dangerous to the life of persons coming in contact with two of them at the same time; that all of its wires were attached by proper and sufficient glass insulators to wooden cross bars or arms at a height of not less than 2 feet and 10 inches above the top chords and top lateral braces of the bridge, and were new and perfect wires, and the insulating used thereon was in perfect order and condition. It is further alleged that the deceased was guilty of contributory negligence in attempting to step

over the wires in crossing the bridge, but that he should have passed under them, either by creeping along on top of the lateral braces or by crossing on the strut brace at the south end of the bridge, which was about $4\frac{1}{2}$ feet below the wires. The reply put in issue the material allegations of the answer, and a trial resulting in a verdict and judgment in favor of the plaintiff, the defendant appeals, alleging as error: First, that the complaint does not state facts sufficient to constitute a cause of action; second, that the court erred in overruling its motion for a nonsuit; and, third, that the court erred in the giving and refusal of certain instructions to the jury.

It is claimed at the outset that the action cannot be maintained, because the statute under which it is brought is a survival statute, and, as the complaint alleges and the evidence shows, that the death of plaintiff's intestate was instantaneous. There was no interval of time between the injury and the death within which the deceased could have brought an action for the injury, and therefore there was no right of action to survive to his personal representatives. The statute provides that a cause of action arising out of an injury to the person dies with the person, except that, "when the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed \$5,000, and the amount recovered, if any, shall be administered as other personal property of the deceased person." Hill's Ann. Laws, §§ 369, 371. It is agreed that at common law there was no remedy by way of a civil action for the death of a human being, and that a cause

of action arising out of an injury to the person died with the person. But the practical impossibility of securing the punishment of mere carelessness by means of a criminal action induced the British Parliament in 1846 to pass what is known as "Lord Campbell's Act," by which a civil remedy is given to the personal representative of one whose death is caused by the wrongful act or omission of another for the benefit of the widow, husband, parent, or child of such person. This statute has been in substance, in one form or another, incorporated into the legislation of most of the states of the Union, and the holding is quite universal that it creates a new right of action for the wrongful death, which may be maintained whether it was instantaneous or consequential. 1 Sherman & Redfield, Neg. § 139; Cooley, Torts, p. 264; and *Seward v. The Vera Cruz*, L. R. 10 App. Cas. 59. But the contention for the defendant is that the statute of this state, unlike Lord Campbell's act and the statutes modeled after it, does not create a new right of action for the death, but is a survival statute under which the personal representatives of a deceased person may bring an action to recover damages for the injury which caused the death in cases where the party injured was entitled to bring such action, but died before exercising such right; and in support of this view we are referred to *Belding v. Black Hills R. R. Co.*, 3 S. D. 369 (53 N. W. 750); *Kearney v. Boston R. R. Corp.*, 9 Cush. 108; *Bancroft v. Boston R. R. Corp.*, 11 Allen, 34; *Corcoran v. Boston & Atl. R. R. Co.*, 133 Mass. 507; *Riley v. Connecticut River R. R. Co.*, 135 Mass. 292; *Mulchahey v. Washburn Wheel Co.*, 145 Mass. 281 (1 Am. St. Rep. 458, 14 N. E. 106); *Maher v. Boston & Atl. R. R. Co.*, 158 Mass. 36 (32 N. E. 950); *Illinois Cent. R. R. Co. v. Pendergrass*, 69 Miss. 425 (12 South. 954.)

But the statutes under which these decisions were

made are essentially different from ours. The statute of South Dakota provides (Comp. Laws, § 5498) that, if the life of any person not in the employment of a railroad company shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, his personal representatives may institute suit to recover damages in the same manner that the person might have done for any injury where death did not ensue; and (§§ 5499) that, if the life of any person is lost or destroyed by the neglect, carelessness, etc., of another person, company or corporation, etc., the widow, heir or personal representative of the deceased shall have the right to sue and recover damages for the death of such person; and the court held, in the case referred to, that under these provisions of the law a personal representative could not recover for the loss of the life of his intestate, but that such right was conferred exclusively upon the widow or heir, and the personal representative could only recover such damages as the deceased had suffered up to the time of his death. For that reason no action could be maintained where the death was instantaneous. The supreme court of Kentucky, however, in *Givens v. Kentucky Cent. R. R. Co.*, 89 Ky. 231 (12 S. W. 257), reached a different conclusion under a similar statute. The statute under which the Massachusetts decisions were made provides that "the action of trespass on the case, for damages to the person, shall hereafter survive, so that in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended by or against his executor or administrator, in the same manner as if he were living;" (Stat. 1842, chap. 89, § 1); and, as Mr. Chief Justice SHAW says in *Kearney v. Boston R. R. Corp.*, 9 Cush. 108, "supposes the party deceased to have been once entitled to bring an action for the injury, and

either to have commenced the action and subsequently died, or, being entitled to bring it, to have died before exercising that right." It is therefore held in that state, under what Judge Cooley characterizes (Cooley, Torts, p. 264) as "a somewhat nice and technical construction of the statute," that the action will not lie when the death is instantaneous, but, if there is the slightest interval between the accident and the death, it can be maintained; and that the right does not depend upon intelligence, consciousness, or mental capacity of any kind on the part of the deceased after he is injured and before his death. The Mississippi statute declares that "executors, administrators and collectors shall have full power and authority to commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted," and that "executors and administrators shall have an action for any trespass done to the person * * * of their testator or intestate against the trespasser, and recover damages in like manner as the testator or intestate would have had if living, and the money so recovered shall be assets and accounted for as such:" Code, §§ 2078, 2079. The court held that the purpose of the statute is "to save to personal representatives the right to begin and carry on such personal actions as the deceased might have begun and carried on if he had not died," and that the personal representative can have no standing in court where the death is simultaneous with the injury, but in such cases all recoverable damages must be sought by the kindred who have sustained the loss.

It thus appears that the statutes construed by the decisions relied upon by the defendant were, as interpreted by the courts, in each instance designed to prevent a cause of action accruing to the deceased in his lifetime

for an injury to his person from being defeated by his subsequent death, and not to create a new cause of action for the death. But such is manifestly not the purpose or effect of our statute. It provides that when the death of a person is caused by the wrongful act or omission of another, his personal representative may maintain an action therefor,—that is, for the death—if the deceased might have maintained an action, had he lived, for the injury which caused the death. The language of the statute is plain and its meaning obvious. It clearly creates a new right of action in favor of the personal representative for the death itself, and not an action founded on survivorship, or on any cause of action in favor of the deceased. The death, and not the injury from which the death results, is the cause of action under the statute, and the personal representatives are entitled to recover damages for the wrongful taking away of the life itself; and therefore it makes no difference whether the injured party was killed instantly or not. Nor does it matter that the damages recovered become assets of the estate, to be administered upon as other personal property of the deceased, and do not go to certain designated persons as provided in Lord Campbell's act, and in many states of this country. This is but a statutory direction as to the disposition to be made of the damages to be recovered, and does not determine the question as to whether the statute creates a new right of action or is only a survival statute. In the absence of the statute, no right of action for the death exists in favor of any person, and it was clearly competent for the legislature, in creating this new right, to make such provision as to the disposition of the damages recovered thereunder as it might see proper.

The statutes of the various states which have in substance adopted Lord Campbell's act differ widely in this

respect, and it has never been suggested, so far as we are aware, that for this reason they do not give a cause of action for the death. And actions brought under section 371 have repeatedly been before this court in one form or another, and it has always been assumed that the action was for the death, and that it made no difference, either in the right to maintain it or in the amount recovered, whether the deceased was killed instantly or not: *Carlson v. Oregon Short Line & R. R. Co.*, 21 Or. 450 (28 Pac. 497). And the same construction has been put upon the statute by the Federal courts. In *The Oregon*, 73 Fed. 846, Mr. Justice BELLINGER, speaking of the effect of section 371, says: "The Oregon statute, unlike that of Louisiana, does not provide that causes of damage to another shall survive in case of death. It is substantially like Lord Campbell's act; and in the case of *Seward v. The Vera Cruz*, L. R. 10 App. Cas. 59, the view held was (Lord Blackburn concurring), not that the cause of action survived, but that 'a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which, as is pointed out in *Pym v. Great Northern R. R. Co.*, 4 Best & S. 396, is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent or child, who, under such circumstances, suffers pecuniary loss by the death.' In the case of *Pym v. Great Northern R. R. Co.* cited in the foregoing quotation, it was argued in behalf of the defendant that the action maintainable under Lord Campbell's act by the personal representatives of a deceased person is 'a mere continuance of that which would have accrued to the deceased if he had lived;' but ERLE, C. J., said: 'The statute, as it appears to me, gives to the personal representatives a cause of action beyond that which the

deceased would have if he had survived, and based on different principles:’ 4 Best & S. 403. And so in *The City of Norwalk* (55 Fed. 98), the court considers the right ‘a new right,’ which is ‘none the less maritime because based upon state legislation, where the subject-matter is maritime.’” And in *Holland v. Brown*, 35 Fed. 43, Mr. Justice DEADY said, concerning the same statute: “The action given by the statute is for the death simply. This includes, of course, all such losses to his estate, or creditors, and next of kin to whom it belongs, and for whose benefit the action is allowed, as may be fairly implied from the cessation of his life. The fact on which the damages are computed is death and its consequences, and not its antecedents or cause.” See also *Lung Chung v. Northern Pac. R. R. Co.*, 10 Sawy. 17 (19 Fed. 254), and *Ladd v. Foster*, 12 Sawy. 547 (31 Fed. 827).

The statutes of Kansas and Indiana are identical with ours, except that damages are allowed to the extent of \$10,000, and must inure to the exclusive benefit of the widow and children, if any, or next of kin. Mr. Justice BREWER, in *Hurlbert v. City of Topeka*, 34 Fed. 510, referring to the Kansas statute, says it “gives a new right of action—one not existing before; an action which is not founded on survivorship; an action which takes no account of the wrong done to the decedent, but one which gives to the widow or next of kin damages which have been sustained by reason of the wrongful taking away of the life of the decedent. It makes no difference whether the injured party was killed instantly or lived months; whether he suffered lingering pain or not; whether or not he was put to any expense for medical attendance and nursing. None of these matters are to be considered in an action under section 422; and the single question is, How much has the wrongful taking away of his life

injured his widow or next of kin? It is an action to recover damages for the death, and in no sense a survival of an action which accrued to the decedent before his death." And to the same effect, see *Martin v. Missouri Pac. R. R. Co.*, 58 Kan. 475 (40 Pac. 605); *City of Eureka v. Merri-field*, 53 Kan. 794; *McCarthy v. Chicago, etc., R. R. Co.*, 18 Kan. 46 (26 Am. Rep. 742); *Missouri Pac. R. R. Co. v. Bennett*, 5 Kan. App. 231 (47 Pac. 183).

In Indiana it has been held that, while the statute does not in terms "revive the common-law right of action for personal injury nor make it survive the death of the injured person," it does "create a new right in favor and for the benefit of the next of kin or heirs of the person whose death has been wrongfully caused:" *Burns v. Grand Rapids R. R. Co.*, 113 Ind. 169 (15 N. E. 230). The questions determined in the adjudged cases on the right of the personal representatives of one whose death was caused by the wrongful act or omission of another to maintain an action for damages against the latter arose under such dissimilar statutes that the decisions afford but little light upon the interpretation of any particular statute at variance with the one under consideration in the given case, and hence it is useless to attempt any further examination of them at this time. However, the following authorities are more or less in point in the present discussion, and in the main tend to support our conclusion as to the proper construction of the statute: *Shearman & Redfield*, Neg. § 139; *Cooley*, Torts, p. 264; 2 *Thompson*, Neg. 1283; *Tiffany*, Death by Wrongful Act, § 73; *Brown v. Buffalo R. R. Co.*, 22 N. Y. 191; *Roach v. Consolidated Min. Co.*, 7 Sawy. 224 (7 Fed. Rep. 698); *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Murphy v. New York R. R. Co.*, 30 Conn. 184; *Givens v. Kentucky Cent. R. R. Co.*, 89 Ky. 23 (12 S. W. 257); *Connors v.*

Burlington R. R. Co., 71 Iowa 490 (60 Am. Rep. 814, 32 N. W. 465); *Worden v. Humeston R. R. Co.*, 72 Iowa 20 (33 N. W. 629); *Nashville R. R. Co. v. Prince*, 2 Hiesk. 580.

It is next claimed that the complaint is defective because it does not show that the deceased left surviving him any heirs, legatees, next of kin, or creditors. Under the provisions of Lord Campbell's Act, and statutes which, like it, give a right of action for the death of a person caused by the wrongful act of another for the benefit of certain designated relatives, no action can be maintained at all unless the deceased left at least one surviving relative of the class specified, and the complaint must necessarily show that fact: 1 *Shearman & Redfield Neg.* § 135; *Stewart v. Terre Haute & I. R. R. Co.* 103 Ind. 44 (2 N. E. 208). In such case the executor or administrator, in prosecuting the action, is a mere nominal party, who sues for the benefit of the real party in interest; and such damages as he may recover do not go to the estate of the deceased, nor belong to him in his representative capacity, but to the person for whose benefit the right of action is given by the statute: *Blake v. Midland R. R. Co.* 18 Q. B. 93; *Bradshaw v. Lancashire R. R. Co.* L. R. 10 C. P. 189. The theory is that those entitled to the benefit of the statute have a pecuniary interest in the life of the deceased, and the recovery is to compensate them for the pecuniary loss they have sustained. In short, a new right of action is created for the benefit of certain designated persons, and consequently can be maintained only when the deceased left surviving him some one entitled to its benefit. Thus, where a statute gives a right of action for the benefit of the widow and next of kin, a husband, not being the next of kin to his wife, is not within its terms, and an action cannot be maintained if the deceased leave a hus-

band only : *Lucas v. New York Cent. R. R. Co.* 21 Barb. 245 ; *Central R. R. Co. v. Dixon*, 42 Ga. 327. So, also, where the statute is for the benefit of the widow and children, no recovery can be had when the deceased left no widow or children : *Com. v. Boston & Atl. R. R. Co.*, 121 Mass. 36. But it will be observed that the right of action created by our statute is not for the benefit of any particular person, but the damages recovered become assets of the estate, to be applied by the administrator to the payment of debts, or distributed as the exigencies of the estate and the laws governing the distribution of personal property may direct. Under Lord Campbell's Act, and similar statutes, the damages recovered belong to the designated beneficiary, and are measured by the value of the life taken to the particular person entitled to the benefit of the statute, while under our statute they belong to the estate, and are coextensive with the value of the life lost, without regard to its value to any particular person. In the one case the object of the action is to recover the pecuniary loss sustained by the designated relatives, and in the other the value of the life lost, measured, as near as can be, by the earning capacity, thriftiness, and probable length of life of the deceased, and the consequent amount of probable accumulations during the expectancy of such life : *Carlson v. Oregon Short Line Ry. Co.*, 21 Or. 450 (28 Pac. 497).

It follows, therefore, that, so far as the right to maintain the action is concerned, it is immaterial whether the deceased left surviving him any relatives or creditors whatever. The right of action is given by the statute to the administrator or executor in his representative capacity, and is in the nature of an asset of the estate. The heirs, creditors or distributees have no interest in the recovery on account of any right of action for the pecuniary injury sustained by them, but only by virtue

of being creditors, or of kinship; and, if the expense of the administration and debts of the deceased equal or exceed the assets, including the amount of the recovery, the next of kin would receive no benefit whatever from the right of action. It is ingeniously argued, however, that an estate of a deceased person can in no way be damaged by his death, and this is probably true if the word "estate" is to be taken in the technical sense of meaning the property left by him. But it is not so used when speaking of the measure of damages for the wrongful death of a person. It is thus used as a convenient term to distinguish the rule as to the measure of damages under our statutes from the one prevailing under statutes similar to Lord Campbell's Act, and in which the recovery is for the benefit of some designated individual.

This brings us to the important question whether the defendant's motion for a nonsuit should have been sustained. It is undisputed that the wires which caused the death of plaintiff's intestate were placed by the defendant in a position where they would probably be exposed to contact by persons working on the bridge, although it knew that it would be necessary to repair the structure from time to time; and it admits and alleges that it is not practicable, in the present knowledge of the science of electricity, to insulate wires so as to make them safe, and not dangerous to persons coming in contact with them, when charged with the high voltage of electricity carried over the wires in question. This is, in our opinion, sufficient to make out a *prima facie* case of negligence, because it tends to support the main ground of recovery relied upon by the plaintiff, *viz.*, that, although the defendant knew it would be necessary from time to time for the railway company to send men on top of the bridge to make needed repairs, it placed its wires to be used in the transmission of such a high

voltage of electricity as inevitably to cause the instant death of any person coming in contact with two of them at the same time in such a position that it was impracticable, if not impossible, to make such repairs without doing so.

It is contended, however, that the deceased was guilty of contributory negligence (1) in going on top of the bridge to work without ascertaining from the defendant company, or someone having knowledge on the subject, whether it would be safe to come in contact with the defendant's wires; and (2) in attempting at the time of the accident to cross from one side of the bridge to the other by walking on the top lateral braces and stepping over the wires, rather than crossing on the end strut brace and under the wires. But both of these contentions proceed on the theory that he was chargeable with knowledge of the fact that the wires were dangerous, and, having voluntarily exposed himself to the risk of contact therewith, must take the consequences of his own conduct. And, indeed, this is the underlying question on this branch of the case. The deceased was unquestionably guilty of such negligence as will preclude a recovery if he is to be charged with knowledge that the defendant's wires, although apparently harmless, were in fact dangerous; for he could have avoided coming in contact with them. But, on the other hand, it cannot be ruled as matter of law that he was negligent in going on the bridge to work or in crossing on the top lateral braces, if the defendant owed to him the duty of exercising reasonable care to prevent injury to him from contact with its wires while at his work. There is evidence tending to show that he acted with due care and caution, and did not heedlessly or recklessly expose himself to contact with the wires. It was only after they had been examined, and their apparent safety ascertained, that

he and his fellow workmen ventured to work at a place where they would probably or necessarily come in contact with the wires ; and there is evidence to the effect that the usual and customary way for men employed in the construction or repair of a bridge of the character in question to cross from one top chord to the other is by walking on one of the top lateral braces. Unless, therefore, the case should have been withdrawn from the jury on the ground that the deceased was bound, at his peril, to ascertain whether the wires were in fact dangerous before working at a place on the bridge where he would be likely to come in contact with them, there was no error in denying the motion for nonsuit, and submitting the issue of negligence as respects the defendant and plaintiff to the jury ; and we do not think any such doctrine as the one suggested can be maintained either upon reason or authority.

It is not claimed that the deceased had any more knowledge of electricity or its effects than such as is possessed by persons of average intelligence. He knew that there is such a force carried by wires and used in driving cars and lighting streets and houses, and that the wires in question were used for that purpose ; but he supposed, as is the common understanding, that the insulating material with which such wires are covered is placed there for the purpose and with the result of making them safe. He had no knowledge of the fact, as this record discloses, that wires are used for the transmission of electricity, which, on account of the high voltage carried, cannot be insulated at any reasonable cost so as to make them safe, and that the insulating material sometimes used thereon affords no protection from injury. Nothing can, therefore, be claimed in this case on account of any special knowledge of electricity or its effect possessed by the deceased ; and there is no pretense that

he knew the wires were in fact dangerous, and, as he was not the agent or servant of the defendant company, he was not, in our opinion, chargeable with such knowledge, nor did he assume any risk on account of the wires unless he knew the danger and voluntarily exposed himself to it. He was not a trespasser or licensee bound to take the premises in the condition in which he found them, but the servant of the railway company, lawfully on the bridge, engaged in an employment which, according to the testimony, necessarily required him to come in contact with the wires of the defendant company. These wires were visible, insulated, and to all appearances perfectly harmless. There was nothing in their appearance to warn the deceased of the great force being carried over them, or that there was any danger in coming in contact with them. The danger was a hidden and secret one, and the insulation of the wires deceptive. The familiar rule that one who deliberately goes into a place of known or apparent danger and is injured must take the consequences of his hardihood can have no application here, because there was in fact no apparent danger, but, on the contrary, so far as the deceased—a nonexpert—could ascertain from an examination, the wires were entirely safe, and in perfect condition. He had a right, therefore, to believe that the place was safe, and to assume that the defendant company had exercised due care and caution to prevent injury to him, and had not placed on the bridge, in such a position that he would likely come in contact with them, wires which it knew to be dangerous. It was using the bridge by permission of the railway company for the support of wires used in the transmission of a highly dangerous, subtle, and invisible force, and was, therefore, chargeable with the duty of placing and keeping them, as far as practicable, in a condition to avoid injuring the servants of

the railway company while at their work. Its duties and responsibilities in this respect are similar to those of an electric company which, by permission of the owner, places its wires over the roof, or attached to a house or building; and in such case the rule is quite universal that the company is liable to the owner and his servants for an injury received through its negligence by contact with such wires when making needed repairs or improvements to the building, if the injured party is in the exercise of due care and caution at the time.

The question respecting the care required of electric companies under such circumstances first came before the courts in the case of *Clements v. Louisiana Electric Light Co.*, (decided in 1892) 44 La. Ann. 692, (16 L. R. A. 43, 32 Am. St. Rep. 348, 11 South 51). In that case the plaintiff's intestate—a tinsmith engaged to assist in repairing the roof—was killed while at his work by coming in contact with the wires of the defendant company, placed 2 feet 4 inches above the roof. The wires were insulated, and to all appearances safe, but there was a defect in the insulation, which caused his death while he was either attempting to step over or go under the wires, in trying to reach the gutter. The court held, after mature deliberation, that the company was responsible. And although there was involved in the case a failure to comply with a municipal ordinance, requiring electric light companies to have the splices of their wires perfectly insulated, it was considered that this ordinance added nothing to the duty or liability of the company. The court says, in speaking upon this matter, that "it [the wire] passed over a roof to which people in adjoining rooms had access, and where, in the course of time, mechanics must go to make repairs, or laborers to sweep off or clean the roof. It was the duty of the company, independent of any statutory regulation,

to see that their lines were safe for those who, by their occupation, were brought in close proximity to them." And in answer to the objection that deceased was guilty of contributory negligence, it said: "The deceased, Clements, was lawfully on the gallery roof. He was engaged in a service that necessarily required him to run the risk of coming in contact with the defendant's wires, either by stepping over them or going under them. It is probable that the latter mode was the most convenient, and there is no evidence that in doing so he incurred any greater risk. The wires were visible, and to all appearances were safe. The great force that was being carried over the wire gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearance of having been properly insulated. From this fact there was an invitation or inducement held out to Clements to risk the consequences of contact. He had a right to believe it was safe, and that the company had complied with its duties specified by law. He was required to look for patent, and not latent, defects. Had he known of the defective insulation and put himself in contact with the wire he would have assumed the risk. The defect was hidden, and the insulation wrapping was deceptive. It is certain, had it been properly wrapped, Clements would not have been killed. His death is conclusive proof of the defect of insulation and the negligence of the defendant. He exercised reasonable care in going under the wire in the performance of his duty, as he had a right to believe, from external appearances, that the wire was safe. His action was such as not to tend to expose himself directly to the danger which resulted in the injury. In fact, there was no apparent danger."

So, also, in *Giraudi v. Electric Improv. Co.*, 107 Cal.

120 (28 L. R. A. 596, 48 Am. St. Rep. 114, 40 Pac. 108), the plaintiff was sent on top of a building by the owner to adjust a sign which was about to be blown down by the wind, and, coming in contact with an electric light wire, placed along and near the roof, was injured, and it was held that the failure of defendant to place its wires a sufficient distance above the roof to enable persons lawfully thereon to pass under them was sufficient proof of negligence to justify the verdict, and that plaintiff was not guilty of contributory negligence by going on the roof. The court say : " Defendant was using a dangerous force, and one not generally understood. It was required to use very great care to prevent injury to person or property. It would have been comparatively inexpensive to raise the wires so high above the roof that those having occasion to go there would not come in contact with them. Not to do so was sufficient proof of negligence to justify the verdict. If there was any excuse for not so locating the wires, it is on the claim that they were so covered that there was no danger in coming in contact with them. The accident itself proves that this was not sufficient, *res ipsa loquitur*. The point most insisted upon here is that plaintiff was guilty of contributory negligence ; that he knew, or ought to have known, of the location of the wires, and should have taken care to avoid them. It is not a case where the doctrine of negligent ignorance can apply. Plaintiff owed defendant no duty, and no part of his employment required him to know, or gave him opportunity to know. Unless it can be held that he did in fact know, there was no evidence which even tended to show negligence on his part." And again, in *Ennis v. Gray*, 87 Hun. 355, the plaintiff, a roofer, employed by the owner of a building, was injured while at his work by coming in contact with an electric light wire of the defendant, which was

attached to the building, and which the evidence tended to show was placed without proper safeguards and improperly insulated, and the court held that the issue as to the defendant's negligence and the contributory negligence of the plaintiff was for the jury. In this case the defendant tried to escape liability by claiming that there was no contractual relation or other privity between it and the plaintiff which required it to protect him while at work for the owner of the building, and while on his premises, and that as to him the construction and maintenance of electric apparatus were *res inter alios*. But the court held that the defendant was engaged in the business of supplying electricity for lighting purposes, and, considering the high voltage which it was necessary to carry over its wires, the business was of a character highly dangerous and likely to result in injury to others unless conducted with care and skill; and therefore, outside of any contractual relation, the law imposed the duty upon defendant of using the necessary skill and prudence to prevent injury to persons coming in contact with its wires, not only as regards the public generally, but also with respect to any individual engaged in a lawful occupation in a place where he was entitled to be.

So also in *McLaughlin v. Louisville Electric Light Co.*, 18 Ky. L. Rep. 693 (34 L. R. A. 812, 37 S. W. 851), a person engaged in painting a building was injured by coming in contact with an imperfectly insulated electric wire on the side of the building, while climbing out of a window upon the cornice, and in an action against the electric company to recover damages for the injury, it was held that the defendant was bound to exercise the utmost care to keep the insulation of its wires perfect at a place where people had a right to go for work, business, or pleasure, although very great care may be sufficient for wires at other places; that an apparently properly

insulated wire is an invitation or inducement to such person to risk the consequence of contact with it; that the fact that the insulation of such wires is expensive or inconvenient is no excuse for failure to make such insulation perfect at places where people have a right to go; and that the plaintiff in the action was not guilty of contributory negligence in coming in contact with the wires unless in so doing he failed to exercise the degree of care which an ordinarily careful and prudent person usually exercises under similar circumstances, and the question whether he exercised such care was for the jury and not the court. A like principle was applied in *Illingsworth v. Boston Electric Light Co.*, 161 Mass. 583 (25 L. R. A. 552, 37 N. E. 778). The plaintiff was employed in the fire alarm system of the City of Boston. The city used for the lines of its system structures erected by the defendant electric company for the support of its electric wires. While the plaintiff was in the performance of his duties and descending one of such structures, the pliers in his belt caught in a wire belonging to the defendant, and in reaching around to clear them he received injury by the contact of his hand with a wire of the defendant not properly insulated; and it was held, in an action against the company for damages, that the defendant's negligence in leaving the joints of its wires without insulation at such place, and the question whether the plaintiff was in the exercise of due care, should have been submitted to the jury. So, also, in *Griffin v. United Electric Light Co.*, 164 Mass. 492 (32 L. R. A. 400, 49 Am. St. Rep. 477, 41 N. E. 675), a tinsmith, while engaged in placing an iron conductor on a building, was injured by receiving a shock from an electric light wire running along the side of the building, about 12 feet from the ground, by reason of the conductor which he was handling coming in contact with a place on the wire

where the insulating material had been worn off, and it was held that the question of defendant's negligence and of due care on the part of plaintiff were for the jury, and that it could not be said as a matter of law that the condition of the wire was so apparent that the plaintiff must or ought to have seen it, although the accident happened in the forenoon; and that, while an expert might consider it dangerous to touch any wire unless he knew it was a harmless one, no such degree of care could be required of the plaintiff, who was not an expert, but that the question of his want of care was for the jury.

Applying the doctrine of these cases, and the underlying principles by which they are controlled, to the case in hand, it is clear that no error was committed in overruling the motion for nonsuit. It is true that in the cases referred to the actions were grounded on negligence in using improperly insulated wires, but in each instance the judgment of the court proceeds on the theory that it is a want of due care for a company handling and transmitting the highly dangerous force of electricity to use a wire known, or which reasonably ought to have been known, to be dangerous, at a place where others are lawfully entitled to be; and it is assumed in each instance that, but for the insufficient insulation, the wires would have been safe. The same principle governs here. Although the wires of the defendant company were insulated, it is admitted that such insulation was no protection whatever to persons coming in contact with them, and hence the negligence of the defendant is equally as great, if not greater, than if the danger had been from insufficient or want of insulation. The apparently perfect insulation was calculated to deceive, and to cause one unfamiliar with the facts to suppose the wires safe. It acted as an invitation to persons at work in and among the wires to risk the consequences of contact

therewith. And such was the effect in this case. But for the insulation, and the belief of safety caused thereby, it is not at all probable that the deceased would have exposed himself to the risk of a contact with the wires in question. The defendant, however, knew that the insulation afforded no protection, and yet, with knowledge of that fact, put its wires in a place where the servants of the railway company might come in contact with them while in the performance of their duties, and without giving any warning or notice of the danger whatever. Under such circumstances a jury would certainly be justified in finding that it did not exercise due care and caution in so doing. Electric companies, of course, are not bound to have perfect apparatus or perfect construction, but they are required to exercise a degree of care and prudence in the construction and maintenance of their wires commensurate with the danger; and where their wires are designed to carry a strong and powerful current of electricity, so that persons coming in contact with them are certain to be seriously injured, if not killed, the law imposes upon the company the duty of exercising the utmost care and prudence to prevent such injury; and whether such care has been exercised in a given case is ordinarily for the jury: *Croswell, Electricity*, § 234.

The cases cited and relied upon by the defendant are not in point in this contention. In *Beck v. Vancouver Ry. Co.*, 25 Or. 32 (34 Pac. 753); *Salem-Bedford Stone Co. v. Hobbs*, 11 Ind. App. 27 (38 N. E. 538); *Salem-Bedford Stone Co. v. O'Brien*, 12 Ind. App. 217 (40 N. E. 430), and *Flood v. Western U. Teleg. Co.*, 131 N. Y. 603 (30 N. E. 196)—the danger was open and visible, and could have been ascertained by the complainant if he had exercised his faculties. In *Hector v. Boston Electric Light Co.*, 161 Mass. 558 (25 L. R. A. 554, 37 N. E. 773), the facts are that a lineman of a telephone and telegraph com-

pany was sent to attach a wire to a standard owned by the defendant on the roof of a building. Instead of entering this building, and going out on the roof, he went up on a building some distance away, passed over the several intervening structures until he came to the building adjoining the one on which the standard was placed. While stooping down to see how he could get from this building to the place of his destination, he came in contact with the wires of the defendant company, and was injured by reason of the insulation being worn off. The case was decided in favor of the defendant, on the ground that it owed no duty to the plaintiff to maintain an effective insulation at the place where he was injured, where he was not sent to work, and where he had no right to be. The same is true of the case of the boy who was killed by coming in contact with the wire of an electric company while searching on top of a building for a lost ball: *Sullivan v. Boston & Atl. R. R. Co.*, 156 Mass. 378 (31 N. E. 128). In both cases the injured party was a trespasser, and at a place where he had no right to be, and where the company was under no obligation to protect him from injury. But in the case at bar the deceased was rightfully at the place where he was injured. In *McMullan v. Edison Electric Co.* (City Ct. Brooklyn) 13 Misc. 392 (34 N. Y. Supp. 248), the defendant company had disconnected its service wires, carrying a low current of electricity, which could not cause death or great bodily harm, from the distributing wires in the cellar, 8 feet above the ground, in order that the owner might make certain repairs, but failed to "tape" the ends of the wires, and it was held that it was not liable for an injury to a workman while engaged in making such repairs, because no reasonable person would, under the circumstances, have anticipated "that any person would have entered this

cellar, mounted upon a box, and, after seeing these wires, taken hold of at least two of them at the same time, in such a manner as to make a short circuit, or bring the two wires in contact with his hand near the same point, and thus burn his hand." In *Burk v. Edison General Electric Co.* 89 Hun. 498 (35 N. Y. Supp. 313) the evidence shows that the deceased deliberately chose a way of known danger to go from one part of a cellar to another, when a perfectly safe way was open to him, and the court held that he must take the consequences of his own hardihood.

It only remains to notice briefly the assignments of error based upon the giving and refusal of instructions by the trial court. The defendant requested in writing some fourteen different instructions, which were refused, except as given in substance in the general charge. All of these, except one, present different phases of the questions already considered, and therefore require no further notice. By the eighth request the court was asked to charge the jury that, if they should find for the plaintiff, they could not estimate nor give exemplary or vindictive damages, nor any damages as a *solatium* for the grief or anguish of the surviving relatives, or the pain or suffering of the deceased. And while this instruction embodies a correct principle of law, and might with propriety have been given (*Carlson v. Oregon Short Line Ry. Co.*, 21 Or. 450 (28 Pac. 497)), its refusal was not reversible error. Neither exemplary damages nor damages for the suffering of the deceased or any of his relatives were asked in the complaint, nor, so far as the record indicates, claimed at the trial. The allegations of the complaint and the proof were confined to the earning capacity, habits, and probable length of life of the deceased, and no instructions were given under which the jury could have understood that they had a right to con-

sider any other matter in arriving at the amount of the verdict. By the instruction as given they were told, in effect, in assessing damages, if they found in favor of the plaintiff, to consider the earning capacity, habits, and probable length of life of the deceased, and thus determine what would probably have been his accumulations if he had lived the ordinary course of his life; and no question is made as to the soundness of this rule. The entire charge of the court as given seems to have been separated into paragraphs, in some instances without special reference to the context, and objections made and exceptions saved to the giving of each; and while the charge, which was given orally, is perhaps open to some criticism on account of the verbal inaccuracy of the language used, to which the attention of the trial court was not specially called at the time, it however, in our opinion, exhibits no reversible error, but, when taken as a whole, fairly and accurately presents the law as applicable to the facts of this case.

The definition of "negligence" as given is not open to the criticism made, nor did the court withdraw the question of plaintiff's intestate's contributory negligence from the jury, but told them expressly that what he had said in regard to the defendant's liability must be taken with the proviso that the plaintiff's intestate did not himself contribute by his own negligence to the injury from which he died, and then proceeded with the charge in detail on that phase of the case. The statement that the words "care" and "diligence," when used in reference to the duty of the defendant, are not absolute, but relative, terms;—"that, when the danger is great, the care and vigilance to escape the consequence of danger must be proportionately great. In matters of this sort, where people are dealing with electricity (one of the most

subtle, powerful, and wonderful agencies known to man ; an agency that is very destructive to human life, even when carefully and properly handled and treated),—I instruct you that in such a case as this due care would be the highest care and vigilance of which a man is capable, and which the condition of science makes known at the time. And this is the degree of care which was demanded of the company : to so conduct itself in regard to the wires on that bridge as that the diligence and care should be proportionate to the danger which there existed,"—is but, in effect, an application to the case in hand of the rule that the care demanded of electric companies must be commensurate with the danger, and that, where their wires are carrying a highly dangerous current of electricity, as is admitted to have been carried over the wires which caused the death of plaintiff's intestate, the law imposes upon the company the utmost degree of care in their construction, inspection, and repair, so as to keep them harmless at places where persons are liable to come in contact with them : Crosswell, *Electricity*, § 234 ; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203 (26 L. R. A. 810, 41 Am. St. Rep. 786, 19 S. E. 344) ; *City Electric R. Co. v. Conery*, 61 Ark. 381 (31 L. R. A. 570, 54 Am. St. Rep. 262, 33 S. W. 426) ; *Giraudi v. Electric Improv. Co.*, 107 Cal. 120 (28 L. R. A. 596, 48 Am. St. Rep. 114, 40 Pac. 108) and authorities heretofore cited.

The questions in this case are important, and many of them of first impression in this state, and therefore we have given to the case that consideration which its merits deserve ; but, finding no error in the record, the judgment must be affirmed, and it is so ordered.

AFFIRMED.

ON MOTION TO RETAX COSTS.

MR. JUSTICE BEAN, delivered the opinion.

This is an appeal from a judgment of the court below in the matter of the retaxation of costs and disbursements in the above-entitled action, and the only question presented is whether a party who is entitled to his costs may recover as disbursements the mileage and per diem of a material witness, residing in the state, who attended the trial at his request, but without having been served with a subpoena. This question was decided in the affirmative in *Crawford v. Abraham*, 2 Or. 163, and again in *Sugar Pine Lumber Co. v. Garrett*, 28 Or. 168 (42 Pac. 129) ; and, as the experience of more than thirty years has shown the rule to be a wholesome one, we do not feel authorized to disturb it at this time, although its soundness may perhaps be open to some question.

AFFIRMED.

Argued 21 December, 1898; decided 3 January, 1899.

STATE v. SMITH.

[55 Pac. 534]

MOTION TO SET ASIDE INDICTMENT.—A defendant who resorts to a demurrer without filing a motion to set aside the indictment is thereafter precluded from making the objection for which his motion is otherwise appropriate. Under the statutes of this state such a motion must be made within the time after arraignment allowed to plead, although the argument may be postponed till a later time: *State v. Pool*, 20 Or. 150, applied.

From Jackson : HIERO K. HANNA, Judge.

Frank Lawrence Smith was convicted of murder and appeals.

AFFIRMED.

No appearance for appellant.

38	488
135	886
135	890
38	488
41	856

Messrs. Cicero M. Idleman, attorney general, and J. A. Jeffrey, for the state.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

The defendant was convicted of the crime of murder in the first degree. The case was three times resubmitted to the grand jury. The fourth indictment, and the one upon which the trial and conviction was had, was returned into court on the eighth day of April, 1898, at which time the defendant was arraigned, and at his request the time to plead was extended until the next day at 1 o'clock p. m. On the day fixed he filed a demurrer to said indictment, which, after argument by counsel, was overruled by the court, and thereupon, and upon the same day, he filed a motion to dismiss the indictment, assigning as grounds therefor that C. O. Ramsey and J. B. Wait were witnesses before the grand jury, and that their names were neither inserted at the foot of nor indorsed thereon. After a hearing, this motion was denied. Two days later, and after the jury had been impaneled, and the trial had proceeded somewhat, it appeared by the testimony of Dr. E. Kerschgessner, coroner of Jackson County, that he had testified in the case before the grand jury, whereupon defendant again moved the court to set aside the indictment for the reason that said witness's name had not been inserted at the foot of nor indorsed upon the said indictment, which was likewise overruled, and the trial proceeded, resulting as above stated. The action of the court in overruling these motions is assigned as error, and this presents the only question relied upon for reversal of the judgment below.

The two motions and the action of the trial court respecting them present but one question, which is one of

practice in no way affecting the merits, and, in our opinion, is regulated wholly by statute. The defendant in a criminal action is entitled to have the indictment set aside when the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon. Hill's Ann. Laws, § 1314, subd. 2. But the motion for the purpose must be made and heard at the time of the arraignment, unless for good cause the court postpone the hearing to a future time; and, if not so made, the defendant is precluded from afterwards taking the objection: Section 1315. These provisions, when read in connection with sections 1293, 1298, and 1299, which provide the manner of making the arraignment, the time that may be allowed to answer the indictment, and the order of the several answers which the defendant may make to the arraignment, have been construed to mean that the motion may be made at any time within the time allowed by the court to plead to or answer the indictment after the arraignment has been made: *State v. Pool*, 20 Or. 150 (25 Pac. 375). By section 1315 the court may, for good cause shown, postpone the hearing to a future time, but if the motion to set aside is not made within the time allowed by the court to plead to or answer the indictment, as said section is construed in *State v. Pool*, *supra*, then the defendant is precluded from afterwards taking the objection to which subdivision 2, § 1314, relates. Section 1320 provides: "The only pleading on the part of the defendant is either a demurrer or plea." These are pleas subsequent to the motion to set aside the indictment; and where the defendant has resorted to the demurrer, without filing his motion to set aside within the time allowed by the court to answer the indictment, he is thereafter precluded from taking the objection for which the motion is otherwise appropriate. This seems to be a plain rule of the statute,

and we are not at liberty to depart from it until the legislature has prescribed another. It follows that the court below committed no error in overruling either of said motions to set aside the indictment, and its judgment is therefore affirmed.

AFFIRMED.

[Decided 14 September, 1888.]

PARRISH v. PARRISH.

[54 Pac. 352]

TRUST EX MALEFICIO—STATUTE OF FRAUDS.—A trust *ex maleficio*, which is not within the statute of frauds, arises where a person, with the intent to eventually appropriate obtains the legal title to property by representing that it will be managed and held in trust for the grantor: but where the grantee, although honestly intending when the title is taken to carry out the trust, afterward forms the design of defrauding the grantor, the trust is within the statute and must be in writing.

HUSBAND AND WIFE—PRESUMPTION.—The presumption that a purchase of land by a husband in the name of his wife was an advance or settlement and not a trust, is disputable and may be overcome by evidence that such was not the intention of the parties nor the nature of the transaction relied upon: *Parker v. Newitt*, 18 Or. 274, and *Taylor v. Miles*, 19 Or. 550, cited.

EVIDENCE TO OVERCOME PRESUMPTION.—The presumption that a deed of absolute conveyance, unambiguous in its terms, expresses the intent of the parties at the time of the execution cannot prevail where fraud vitiates the conveyance itself.

DOWER.—A widow is entitled to dower in land conveyed to her by her husband during his lifetime, but as to which she is held to be a trustee *ex maleficio* for the heirs because of her fraud in procuring the conveyance.

From Marion: HENRY H. HEWITT, Judge.

Suit by S. B. Parrish and others against Mattie A. Parrish, in which plaintiffs prevailed, hence this appeal.

AFFIRMED.

For appellant there was a brief and an oral argument by *Messrs. Geo. H. Williams, John A. Carson and Geo. G. Bingham.*

For respondents there was a brief and an oral argument by *Messrs. D'Arcy & Richardson.*

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This suit was instituted by the heirs and personal representatives of the late Josiah L. Parrish against his widow for an accounting, and to have her declared a trustee of certain real and personal property which it is alledged she acquired from him either directly or indirectly for their use and benefit. Josiah L. Parrish and the defendant were married in August, 1888, and were aged, respectively, eighty-three and thirty-eight years. On February 1, 1889, he signed a will which purported to devise and bequeath to the defendant all his property, both real and personal, except \$170, which was otherwise disposed of. On the same day he executed two deeds which purported to convey to her all his real property. On July 16, 1889, he and the defendant, for the consideration of \$400 per acre, contracted in writing to sell and convey to Thomas H. Barnes, William Howard Phelps, William T. Seever and Hugh V. Matthews about seventy-two acres of said real property; \$1,000 was paid down, \$4,000 additional was to be paid upon the execution of the deed, and the remainder to be secured by mortgage on the premises. The conveyance was made September 27, 1889, to Phelps and Matthews, and the \$4,000 cash payment was thereupon made in pursuance of the agreement, and notes and mortgages were executed to the defendant covering the balance of \$24,192. On September 28, 1889, all these lands were conveyed to the Salem Land Company. This company subsequently made large payments upon the notes to the defendant, but, being unable to meet them in full, conveyed to her a very considerable portion of said premises, which now stand in her name. On March 20, 1890, the defendant purchased from Matthews, for the consideration of \$12,782, a tract of land known as the "Garden

Road Property," consisting of 32.66 acres, and took the title in her own name. This, it is alleged, she purchased with the funds of her husband, and she acquired other small tracts under like conditions. On April 10, 1890, Josiah L. Parrish and defendant made, executed and delivered to F. R. Smith three deeds,—one for the dwelling house in which they were then living, and the lots upon which it was situated, which property is not in dispute, and the other two purported to convey all the real property of which he was possessed at the time of the marriage that had not been subsequently conveyed to third parties; and upon the same day, and as part of the same transaction, F. R. Smith and wife transferred by their deeds of conveyance the same property to the defendant. Several other parcels of land which belonged to Josiah L. Parrish at the date of the marriage were sold and conveyed prior to the execution of said deeds to Smith, and large sums of money realized therefrom. One parcel may be mentioned as that conveyed to Christian Frickey, February 4, 1890, for \$10,-200. It is now sought to have the defendant declared a trustee, for the use and benefit of the heirs and personal representatives of Josiah L. Parrish, of all the lands that she acquired through the several conveyances above referred to; and some others, of small moment, not mentioned, and also of the funds which it is alleged she received for the lands disposed of; and for an ascertainment of the amount for which she is liable an accounting is prayed.

The complaint states the age of the said Josiah L. Parrish, his consequent infirmities, and his inability, by reason of his alleged enfeebled condition, both physically and mentally, to efficiently and profitably manage his large property interests; that, in pursuance of a mercenary and wicked design to acquire the property of the

deceased wrongfully and without consideration, the defendant, on February 1, 1889, and while the said Josiah L. Parrish was afflicted with a severe attack of apoplexy, and unable to comprehend or intelligently understand the nature of the business in hand, and by reason thereof incapacitated for the transaction of the same, the defendant dictated the will and deeds of that date, and procured their execution by him to her; that thereafter the said Josiah L. Parrish partially recovered from said attack, and the defendant, well knowing that he was incapacitated from making said will and deeds, and deeming said documents worthless for that reason, set about to cheat, overreach, and defraud him of his property, and to cause other deeds to be made to her at a time when he could execute the same and understand their purport; and in furtherance of the said wicked design she represented and pretended to him that because of his infirmity he could not efficiently conduct his business and manage his said property, and that, if he would place the title to all of said property in her name, she would safely keep, manage, and protect the same for his use and benefit, and to his best interest, and that she would hold the said property and its proceeds and accumulations in trust for him; that said Parrish was ignorant of the pretended will and deeds signed February 1, 1889, and was ignorant of defendant's intention to cheat and defraud him, and of her scheme and aim to wrongfully acquire the title to his property in order that she could claim it as hers, and thereby appropriate the same to herself; and, relying upon her honor as his wife, and upon her business capacity, and fully believing that his property and business affairs could be more fully and efficiently subserved and managed by defendant than by himself, and relying upon her promise to manage said property and business, and safely keep and retain the

same in trust for him and for his use, he yielded to her persuasions and importunities, and did, on or about September 1, 1889, agree that said property should thereafter be transferred to defendant for said reasons and purposes, and not otherwise. Then follow specific averments concerning particular transactions, tracing the manner of transfer and final acquirement by her of the legal title to all the property in controversy, and finally that the defendant has never accounted for any of said property, but has appropriated it to her own use, and now fraudulently and illegally claims to own the same. These allegations constitute the gist of plaintiff's cause of action.

The defendant, who is appellant here, contends that the complaint is framed upon the theory of an express trust, and, as it is admitted that there was no note or memorandum in writing subscribed by her expressing or declaring the alleged trust concerning such real property, that it is not otherwise provable. It is statutory that no trust or power concerning real property can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing subscribed by the party creating, transferring, or declaring the same, or by his lawful agent under written authority, and executed with such formalities as are required by law: Hill's Ann. Laws, § 781. But trusts arising by operation of law are not within the purview of this statute. See, also, Id. § 782. Among such are constructive trusts arising *ex maleficio*, which plaintiffs contend is the nature of the one here involved. The two contentions are opposites, and we are to determine which is sustainable under the complaint, and, if the latter, whether the evidence establishes it. Mr. Pomeroy has stated the doctrine touching trusts arising *ex maleficio* as follows: "In general, whenever the legal title to prop-

erty, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrong-doer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust": 2 Pomeroy's Equity, § 1053. Mr. Justice PAXSON, in *Christy v. Sill*, 95 Pa. St. 380, says: "It may be said, as a general proposition, that, whenever a person has obtained the property of another by fraud, he is a trustee *ex maleficio* for the person so defrauded. The reason of it is this: Having perpetrated a fraud, and by means thereof obtained the property of another, equity will not permit him to enjoy the fruits of his fraud, but will hold him to be a trustee for the rightful owner. He is not trustee for the title, for that he never acquired, but of the thing which he has in manual possession." These and similar cases are not technical trusts, but constructive trusts, or trusts *ex maleficio*.

Mr. Bispham, in his work on Principles of Equity (4th Ed. § 91) states the principle in much the same way. "Equity," he says, "as we shall see, makes use of the machinery of a trust for the purpose of affording redress in cases of fraud; as, when a party has acquired the legal title to property by unfair means, he will be deemed to hold it in trust for the injured party, who

may call for a conveyance thereof. The party guilty of the fraud is said in such cases to be a trustee *ex maleficio*. But in such cases the interference of courts of equity is called into play by fraud as a distinct head of jurisdiction, and the complainant's right of relief is based upon that ground; the defendant being treated as a trustee merely for the purpose of working out the equity of the complainant." In *Huxley v. Rice*, 40 Mich. 73, it is said: "It is the settled doctrine of the court that where the conveyance is obtained for ends which it regards as fraudulent, or under circumstances it considers as fraudulent or oppressive by instant or immediate consequence, the party deriving the title under it will be converted into a trustee, in case that construction is needful for the purpose of administering adequate relief; and the setting up of the statute against frauds by the party guilty of the fraud or misconduct, in order to bar the court from effective interference with his wrongdoing, will not hinder it from forcing on his conscience this character as a means to baffle his injustice or its effects." Fraud is the especial element which dominates and characterizes the cause of suit, and its existence must become or be made manifest, and it is this that distinguishes the trust which equity employs for the purpose of affording redress from unconscionable conditions and the promotion of the ends of justice and fair dealing from a trust of an express or specific nature. He who has been guilty of the employment of any of the devious and insidious arts of fraud to the purpose of any undue, improper or unconscientious advantage ought not to be permitted to perpetuate the wrong by invoking the agency of the statute of frauds and perjuries, which was enacted to prevent the very ends of his accomplishment; and such is the spirit as well as the letter of the law, as promulgated by all the authorities, without a

dissenting voice anywhere. "The principle of this court is," says Lord Justice TURNER, "that the statute of frauds was not made to cover fraud." *Lincoln v. Wright*, 4 De Gex & J. 16. See, also, *Dray v. Dray*, 21 Or. 59 (27 Pac. 223); *Moore v. Crawford*, 130 U. S. 122 (9 Sup. Ct. 447); *Jones v. Van Doren*, 130 U. S. 684 (9 Sup. Ct. 685); *Darlington's Appeal*, 86 Pa. St. 512 (27 Am. Rep. 726); *Thomson's Lessee v. White*, 1 Dall. 434 (1 Am. Dec. 252); *Ryan v. Dox*, 34 N. Y. 307 (90 Am. Dec. 696); *Wheeler v. Reynolds*, 66 N. Y. 227; and 1 Beache's Modern Equity, § 233.

Without attempting an extended analysis of the complaint, suffice it to say that we are distinctly impressed that it states a cause sounding in fraud, rather than one based upon an express trust. The extreme age and mental infirmity of the deceased are averred. The fact of her taking undue advantage of him while afflicted with a severe attack of apoplexy and wholly incompetent for the transaction of any business, and procuring the execution of the will and deeds of February, 1889, and of her subsequent concealment from him of the fact that such instruments had been made or executed, is set forth by way of inducement, and then follow the allegations of her fraudulent purpose of acquiring the property with the present intention of ultimately withholding it from him and claiming it as her own, while she induced him to believe that it was necessary for her to have the legal title to enable her to more expeditiously and advantageously manage the property and conduct the business appertaining thereto for him, together with the further statement of the manner of her acquirement of the legal title, her refusal to account, and claim of ownership. All which, when the manner of their statement is considered, is sufficient to characterize the complaint as one founded upon matters arising *ex maleficio*, rather than

a trust arising by express agreement of the parties, although it may contain some allegations touching specific transactions which may give color to the theory that it is a declaration upon an express trust.

Pursuing the discussion of the nature of the cause a little further, we again quote from Mr. Pomeroy. He says: "A second well-settled and even common form of trusts *ex maleficio* occurs whenever a person acquires the legal title to land or other property by means of any intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose,—as, for example, a promise to convey the land to a certain designated individual, or to reconvey it to the grantor, and the like; and, having thus fraudulently obtained the title, he retains, uses, and claims the property as absolutely his own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit": Pomeroy's Equity, § 1055. In *Brisson v. Brisson*, 75 Cal. 525 (7 Am. St. Rep. 189; 17 Pac. 689), the complaint averred that the husband, being influenced by the wish of the wife to save her the expense of probate proceedings in case of his death, and having confidence in her and relying upon her verbal promise that she would reconvey to him upon his request, made a deed to her absolute in form, but that the promise by which plaintiff was induced to make the deed was in bad faith and false, and made with intent on her part to deceive, and did deceive, the plaintiff; and it was held that the construction that should be given to the averment that the promise was made without any intention of performing it constituted a well-recognized species of fraud. To the same effect, see, also, *Newell v. Newell*, 14 Kan. 202; *Henschel v. Mamero*, 120 Ill. 660 (12 N. E. 203); *Manning v. Pippen*, 11 Am. St. Rep. 46 (5 South. 572). The essence of the fraud consists in the existence

of a wrongful intent at the time to eventually appropriate the property while lending countenance to the belief in the owner that it was designed to be used for, and would finally inure to, his benefit. It differs from a promise with a purpose of complying therewith at the appointed time, and a breach thereof, for it is settled and conceded that a mere failure to fulfill the promise is not fraud, and the statute applies in such a case; but if the evil intent primarily existed, as above suggested, the transaction is fraudulent, and without the statute.

It remains to determine whether the plaintiffs have established their cause by the evidence produced at the trial. No reliance is placed upon the will or the deeds of February 1, 1889, by appellant, and nothing is claimed for or under them; and hence it is unnecessary to discuss in detail the transaction which gave rise to their existence, further than to say that Mr. Parrish was in a condition of mind which in all probability incapacitated him from understanding the nature of the transaction or comprehending what was being done, and this the defendant well knew. The next transaction of moment relates to the sale of the seventy-two-acre tract of land. On July 16, 1889, the contract of sale was entered into, as previously stated. At that time Josiah L. Parrish had an account with Ladd & Bush, while the defendant had none. Parrish alone was permitted to check against the account. The \$1,000 paid on the date of the execution of the contract appears in this account to his credit as having been placed in bank on the following day, July 17th. Subsequently, on the twenty-seventh of September, 1889, when the deed was made, an additional \$4,000 was paid; but instead of placing this money in the bank to the credit of Josiah L. Parrish, as she evidently did the first payment, she sent it to Portland, and took a certificate of deposit payable to herself. Mat-

thews testifies concerning the transaction : " I supposed it [the land] belonged to Parrish during the negotiations ; but after we consummated the agreement, and had drawn the contract, Mrs. Parrish mentioned to me, when there was no one else present, that there had been deeds made to her to this property, but they were not on record, so that they would deed the property both together to us in this transaction. * * * It was clearly Mr. Parrish's property, under the arrangement, just like it was before. He called it so, but I made the bargain and settled with her, of course. * * * She called it his property, and said she was advising and managing it for him. * * * She wanted Mr. Parrish to consent to having the mortgage made to her, if he would, which he did consent to. We did not pay down entirely for the property, and the mortgage was made back to Mrs. Parrish. * * * Mr. Parrish would want us to talk to him about the business, and she wanted us to, more or less, and she claimed, and said, being as it was his property, she wanted him to have his will in the matter from time to time, but he was very irritable, nervous, and old, and rather in his dotage, and it was very difficult to get along with him, because he did not comprehend business very well. * * * Mrs. Parrish had her way, as a rule." Subsequently, on February 4, 1890, Josiah L. Parrish and the defendant sold the tract of land to Frickey for the consideration of \$10,200, the greater portion of which the defendant deposited in the bank to her individual credit. This account had been opened but a short time previous,—about the first of that year,—and it was subject to her checks only. On March 20th following, she purchased the Garden Road property for the consideration of \$12,782, and paid for it mainly, as she says, with the \$4,000 she had on deposit in Portland, and a check upon Ladd & Bush against her account for

\$8,500. This account shows a charge of a like amount of that date, so that the funds which went to that purchase are quite clearly traced.

On April 10th following, the deeds were made to her through F. R. Smith, the consideration named being \$8,000; but, as a matter of fact, none was received by Parrish. These included, as we understand, all the lands of Parrish which he possessed at the date of the marriage remaining undisposed of to other parties. F. R. Smith testifies, in substance, that a day or so prior to the execution of the deeds in question he and his wife were visiting with Mr. Parrish and the defendant, and that when they were about to take their departure Mr. Parrish requested them to return the next day but one, and said he wanted to deed the home property—the dwelling in which they lived, and lots upon which the same was situated—to Mrs. Parrish; that he had made a deed directly to her for it, and, for fear it was not valid, he wanted to make the transfer to the witness, and then have himself and wife transfer to Mrs. Parrish; and that he had intended to have had the deed made in her name when he bought the property, but that by mistake it had been deeded to him. The witness further testified that he and his wife called at the time agreed upon, and then it was he ascertained that they intended making more than one deed, and that property other than the dwelling was to be transferred. Witness asked Parrish what it meant, and he said he wanted to have witness sign the other deed, and that it was a matter of business, so that Mrs. Parrish could transact the business for him, as he was not able to get about, and hardly able to attend to business, and that the defendant also said to him that the purpose of the additional transfers was to so arrange it “that she could attend to the business, as he was not able to attend

to it." Mrs. Cline, who was present and witnessed the deeds, testified that Mr. and Mrs. Parrish asked her to sign the deeds, but before signing she asked permission to read them over, and that thereupon they explained to her that it was simply for a business transaction, and that Mrs. Parrish hurried her up for fear that Norman Parrish, a son of Josiah L., would come in in the meanwhile and make a row about it. Witness learned from the conversation that Mrs. Parrish was to have the home place where they were living for herself, and the rest of the property was to be conveyed to her so that she could attend to the business for him; that he did not seem to want to bother with it, and the purpose was to so arrange it that she could attend to the business without so much trouble. Witness further says: "I heard Mr. Parrish and Mr. Smith talking about the business. I didn't pay much attention to the whole conversation, but I remember him saying to Smith that he was conveying this to her in trust for her to attend to the business for him; it was not permanent, but in trust."

In corroboration of these witnesses many others were called, who testify to admissions of the defendant touching the purpose for which she was holding the property in her name. Dr. D. W. Ward testifies that in April, 1890, Mrs. Parrish told him that she was managing the business, and was doing a good deal of business, and that she supposed it would create a good deal of animosity and hard feeling with the children, but that she was managing it accurately, and could account for every dollar of it. Witness inferred from her conversation that she was doing the business for Mr. Parrish because he was not competent to manage it himself. Andrew G. Vaughn testifies that in 1894 he heard a conversation between Mr. and Mrs. Parrish and Dr. Pierce, and that she made the remark that all the land that was there,

and things that belonged to Mr. Parrish, she could account for, and that she was looking after and working for his interest. Dr. Pierce corroborates this statement. He says: "She was talking with me in the dining room when Father Parrish was present, when she told me she had been obliged to take charge of or take the property in her name to manage it for the children; that Father Parrish was old and feeble, and not competent to do business, and she was doing it for him." Mrs. Eliza Smith says that Mrs. Parrish told her that Father Parrish was not able to attend to business, and had turned it over to her to transact (this was some time in 1893); and J. M. Gross, that in the summer of 1889 Mrs. Parrish told him that she was transacting the business for Mr. Parrish, and that she was the proper party to pay some money to that was due her husband. Samuel Parrish testified that she said to him, in Portland, in 1890, "I want you to understand those deeds were given to me to conduct the business for your father." Testimony was also adduced touching the declarations of Mr. Parrish made prior to and at the time of the transfers, to the same purport. Some were shown to have been made later, but of a contradictory tenor. To these latter we have attached no importance.

As one of her separate defenses, the defendant alleges that all the property referred to in plaintiffs' complaint which the said Josiah L. Parrish conveyed to her was intended as a gift, advancement, and settlement by him to her, and not in trust for him or the plaintiffs. Mrs. Parrish, when called as a witness, denied in the main all admissions attributed to her, and disputed the testimony of Matthews, Smith, and Cline touching the purpose for which she was permitted to take the property in her name. She testifies touching the Smith deeds as follows: "Q. At the time of the making of these Smith

deeds, was there any agreement in regard to the trust? If so, what was the agreement? A. There was no agreement. Q. How were you holding that property, Mrs. Parrish, if not in trust? How were you holding the real estate? A. I think the deeds show I was to have and hold it. Q. Holding it as your own? A. Yes, sir; and to my heirs." Touching the same subject she continued on cross-examination: "Q. What did you mean when you gave this expression, 'that the deeds show I was to have and to hold it to my heirs,' speaking of the deeds made by Fabritus Smith and wife to you? What did you mean by that expression? A. I think I answered that they were mine to convey the property away. Q. Did you think that particular clause in the deed had any significance in making your title to the property any more certain? A. I don't think I thought anything about it. Q. How do you happen to think it now? A. I could not answer that. It happened to come into my mind. * * * I don't think at the time the deeds were made there was any conversation about what they were made for at all; so far as the conversations were concerned, I don't think there was. Q. Why were the deeds made to Mr. Smith? A. I could not answer that. Q. Why were they made by Smith and wife to you? A. To convey the property to me. Q. As a gift? A. I don't know what you would call it. Q. You haven't told why these deeds were made by Mr. Smith and wife to you. A. You remember Mr. Parrish made a will in 1890, and some deeds that were not recorded, and a year afterwards he was taken ill with la grippe, and he had hiccoughs three days and nights, and supposed he was going to die; and some one came and told us that Norman's people had consulted Richardson about breaking this will and taking the property, and told Parrish that, if he hadn't provided for me, that he ought to do it, on

account of the care I was taking of him, and he said that he had provided for me, and had given me the property, and supposed those deeds had been recorded.

* * * When he learned those deeds were not recorded, he was anxious then about the matter; and he said that he would send for Norman's people, and ask them to sign a contract to let the will stand,—the disposition of the property that he had made. He had no idea and didn't worry about these two sons. He thought they would not bother him. And he did send for him to sign the contract to let the papers alone, and he agreed to do it. And they had another conversation, and they refused to do it. Norman at one time (about the time that Mr. Parrish was up and about the house) agreed to it, and then Mrs. Parrish and he talked with them about signing the papers to let the papers alone for the consideration of their house, to cost from \$1,200 to \$1,500, and they refused to do it; and when they went away he said he would see whether we have, or the children or himself had, the say about what was left of the property; the property was pretty near all gone, and he thought he had a right to have the say about what became of it. I think he consulted some attorney (I don't know whom; probably Mr. Hammer or somebody else) about the best way to transfer the title. I think they advised him to transfer it to somebody else. Q. Why did you and Mr. Parrish consider those deeds were not sufficient to convey the property to you, and the will not sufficient to bequeath you his property? A. Well, he didn't have very much — in any will, because he always held that they were too easily broken. Q. Did you have any faith in a will? A. I didn't think much about it. I allowed him to make a will to satisfy his mind. Q. What was his belief with reference to the deeds? A. He was afraid — because they had lain so long without being recorded—

he was afraid it would affect the validity of them. Q. Did you think the deeds were all right? A. I thought they would carry the property provided they were recorded. Q. You kept them well? A. Yes; for several years."

There was testimony touching the enfeebled condition of the old gentleman's mind at the time of his marriage to the defendant, and of his forgetfulness and disinclination to transact business, and much that was contradictory regarding his disposition to exercise his own mind and notions touching the management and control of his property rights; but there is no doubt that for the time the defendant had the superior intellect, and dominated in a marked degree the greater proportion of his business transactions. She admits that she attended to whatever business interests he had, but leaves the inference that they were limited after she acquired the property in controversy, and to this extent it must be conceded that she was his business manager and financial agent. The way and manner in which the will and deeds of February 1, 1889, were obtained exhibited a disposition upon her part to possess herself of the property without regard to the condition or fitness of the old gentleman's mind to dispose of it; and then the act of procuring both the will and the deeds covering the same property, "making assurance doubly sure," was one well calculated to throw doubt and suspicion upon the good faith of the transaction. The two instruments were inconsistent in their tenor and effect. The will could only become effective to convey title at the death of the testator, while the deed should have taken effect at the date of its execution, if delivered as she contends. She did not have the deeds recorded, notwithstanding she was their custodian. But when it came to the sale of the 72-acre tract she told Matthews aside, and said

privately, that she held the deeds, but that they had not been recorded, and, in effect, that she claimed nothing for them. In accord with this idea, the first \$1,000 payment was deposited in the bank in the name of Mr. Parrish, and was subject alone to his check. But when the deed was made she insisted that the notes and mortgages be made out in her name, to which her husband consented. She took a certificate of deposit for the \$4,000 cash paid in her own name. Why she did this is not explained, and whether he directed it or not she does not say.

Shortly afterwards, about January 1, 1890, she opened an account with the bank, and thenceforward all financial transactions of any moment appear to have been conducted in her name. She does not attempt to explain why Mr. Parrish allowed her to take the notes and mortgage in her name, but leaves us entirely to inference for our deductions. She does not say, while claiming nothing for the will or deed formerly executed, that the old gentleman intended to give her the money and the notes and mortgage representing the balance of the consideration for the land sold to Matthews and others, yet from that time forward she claims these funds as her own. Later, when she bought the Garden Road property, and took the title in her own name, she used the \$4,000, together with a large proportion of the proceeds of the Frickey tract, to pay for it, and yet she testifies that she paid for it with her own funds. If she claimed nothing for the deeds of February 1, 1889, the land sold to Frickey could not have been hers at the time of the sale to him; and, if not hers, how did she obtain the title to the proceeds? This she does not attempt to explain, although constituting a large item, of more than \$10,000; and here we are again left to mere inference, looking from her standpoint. Subsequently she obtained

the Smith deeds, the purpose of which is largely explained by the testimony for plaintiffs, and took the title back in her own name to much of the tract conveyed to Matthews & Co., which had to be surrendered in consequence of the inability of the parties to pay for it; and her story touching the Smith deeds is upon its face inconsistent and improbable as respects some of the important features of the transaction.

In support of her contention the defendant invokes two presumptions of law: One, that where the purchase of land is made by a parent in the name of his child, or by a husband in the name of his wife, it will *prima facie* be presumed to be an advancement or settlement, and not a trust; and the other, that a deed of absolute conveyance, unambiguous in its terms, must be presumed to express the intent of the parties at the time of its execution: *Goelz v. Goelz*, 157 Ill. 33-45 (41 N. E. 756); *Hill's Ann. Laws*, § 775, subd. 3. The former of these presumptions is disputable, and may be overcome by evidence that such was not the intention of the parties, nor the nature of the transaction relied upon (*Parker v. Newitt*, 18 Or. 274, 23 Pac. 246; *Taylor v. Miles*, 19 Or. 550, 25 Pac. 143); and the latter can never prevail where fraud vitiates the conveyance itself. The declarations of the deceased, at the time some of the transactions were effected, that the property with which they were dealing was his, and, as it related to the last transfers, that they were made for the purpose of enabling his wife to transact his business for him, and her admissions from time to time that the land and other property belonged to him, and that the transfers were made to her to enable her to transact the business for him, and that she was holding it for him and his children, and was able to account for all of it in due time, afford a better explanation of the true condition and status of the

property rights than the legal inferences which she has invoked in favor of her title. She was to all intents and purposes his financial agent, acting in a fiduciary capacity; and, while her intention to appropriate at the time of acquiring the legal title is not made to appear by her positive declarations, yet the whole course of her demeanor towards her husband as it concerned his property indicates quite clearly that she designed that it should eventually inure to her benefit through and by means of the very transfers which she was instrumental in causing to be effected.

She induced her husband to believe all along that she was managing and carrying on his business, not hers, with assets that were his, and that she held the legal title for the purposes of business convenience only. That this constitutes a species of deceit for which the law gives redress we have no doubt, and the defendant will accordingly be declared a trustee *ex maleficio* of the real property in controversy for the use and benefit of the heirs at law of the deceased. Such being our conclusion, plaintiffs' contention that the defendant is not entitled to dower in the real property is not maintainable. The logical deduction is that, as the heirs are entitled to the real property by right of inheritance from him, she is entitled to her dower as his widow. The law declares her to be a trustee *ex maleficio* for the purpose of working out equity. As Mr. Justice PAXSON says, "He is not trustee for the title, for that he never acquired, but of the thing he has in manual possession": *Christy v. Sill*, 95 Pa. St. 380, and *Bispham's Equity*, § 91. The defendant holds the legal title, which her husband should have possessed but for her fraudulent devices, and we know of no rule of law by which such acts and demeanor on the part of the wife will forfeit her right to dower in her husband's estate.

As it respects the accounting touching the money which the defendant has received from time to time, it is impossible from the evidence to state an account. We are strongly impressed, however, from the testimony, that she has used all the funds received by her in defraying the expenses of the family, conducting the business with which she was intrusted, and in the purchase of the real property now standing in her name, and of which she is declared a trustee for the use of the heirs of Mr. Parrish, and therefore that plaintiffs are entitled to no relief upon this phase of the controversy. The decree of the court below will be affirmed, and it is so ordered.

AFFIRMED.

Argued 23 January; decided 20 March, 1899.

STATE v. LEE.

[56 Pac. 415]

RAPE—INDICTMENT—DUPLICITY.—An indictment charging that defendant, being a male person over sixteen years of age, did forcibly ravish and have carnal sexual intercourse with a specified female child under sixteen years of age, charges common law as well as statutory rape, and is open to an objection for duplicity, which, however, is waived by failure to demur. After a conviction on evidence of a forcible ravishment the allegations as to age will be rejected, the charge being complete without them: *State v. Horne*, 20 Or. 485, applied.

From Washington: THOS. A. McBRIDE, Judge.

James Lee, Jr., was convicted of rape, and appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Messrs. Samuel B. Huston* and *Martin L. Pipes*.

For the state there was a brief over the name of *Mr. T. J. Cleeton*, district attorney, with an oral argument by *Mr. D. R. N. Blackburn*, attorney general, and *Mr. Cleeton*.

88	506
39	28
88	506
43	48

MR. JUSTICE MOORE delivered the opinion of the court.

The defendant, James Lee, Jr., was tried upon an indictment, the charging part of which is as follows: "That said James Lee, Jr., on the 17th day of June, A. D., 1897, in the said County of Washington, State of Oregon, then and there being, and being then and there a male person over the age of sixteen years, did then and there, wilfully, unlawfully and feloniously, forcibly ravish and have carnal sexual intercourse with one Sarah Ann Hammock, a female child under the age of sixteen years"; and, having been convicted, he was sentenced to imprisonment in the penitentiary for the term of three years, from which judgment he appeals.

This indictment was predicated upon a violation of the provisions of section 1733, Hill's Ann. Laws, as amended by the act of the legislative assembly approved February 23, 1895, which reads as follows: "If any person over the age of sixteen years shall carnally know any female child under the age of sixteen years, or any person shall forcibly ravish any female, such person shall be deemed guilty of rape, and, upon conviction thereof, shall be punished by imprisonment in the penitentiary for not less than three nor more than twenty years": Laws, 1895, p. 67. The state, to maintain its case, introduced evidence tending to prove that the prosecuting witness was only twelve years old when the alleged assault was committed, and that the defendant forcibly ravished her; but, having rested without offering any proof of the defendant's age, his counsel moved the court to instruct the jury to acquit him, which motion having been overruled, an exception was saved. The defendant offered to prove that at the time of the commission of the alleged crime he was not sixteen years old, but the court, refusing to permit such testimony to

be introduced, allowed an exception to its ruling. It is maintained that the indictment only charges the defendant with carnally knowing a female under the age of sixteen years, and that the phrase "forcibly ravish," as used therein, is a mere statement of a legal conclusion deducible from the allegation of sexual intercourse and founded upon the application of such force only as the law implies from the inability of the female, by reason of her immature age, to give her consent to an act of copulation, and, hence, that the allegation of defendant's age was material, a failure to prove which was such a variance as should secure a reversal of the judgment, and that the refusal of the court to permit the defendant to prove that he was under the age of sixteen years at the time it is alleged that the crime was committed was the denial of a substantial right, to his prejudice.

Counsel for the state insist, however, that the indictment charges the commission of two offenses, viz., common-law and statutory rape, and that, inasmuch as no demurrer on account of the duplicity was interposed, the state had the right to adopt either theory of the case; that, having elected to rely upon the allegation of a forcible ravishment, the averment of defendant's age became immaterial; and that after verdict such averment should be rejected as surplusage, if the indictment properly charges the commission of the common-law offense. The statute, in prescribing the manner of stating an offense, provides that the indictment must charge but one crime, and in one form only (Hill's Ann. Laws, § 1273), and that any violation of this rule affords a ground of demurrer (Id. § 1322), but, if no demurrer for the duplicity be interposed, the objection to the pleading on that account is thereby waived: Id. § 1330; *State v. Bruce*, 5 Or. 68; *State v. Doty*, 5 Or. 491; *State v. Jarvis*, 18 Or.

360 (23 Pac. 251); *State v. Horne*, 20 Or. 485 (26 Pac. 665). An indictment which charges "that said A B on the — day of —, 18—, in the county aforesaid, being then and there a male person over the age of sixteen years, carnally knew one C D, a female child under the age of sixteen years," would have probably stated facts sufficient, under our statute to have constituted a crime: 1 Hill's Ann. Laws, p. 1002, Form No. 7; Id. § 1269; Laws of Oregon, 1895, p. 67. The rule was early established by the courts that the seeming acquiescence of a female of feeble mind or of very tender years to an act of sexual intercourse afforded no defense to an action of rape, because such female, being ignorant of the nature of the act, was incapable of yielding consent, from a defect of understanding: *Hays v. People*, 1 Hill, 351; *Stephen v. State*, 11 Ga. 225; *O'Meara v. State*, 17 Ohio St. 515; *Moore v. State*, 17 Ohio St. 521. Legislative assemblies, applying the rule thus established, have arbitrarily prescribed, in many instances, the age at which a female of ordinary intelligence is presumed to have attained such a degree of mental development as to be capable of consenting to the commission of that particular immoral act, which, when discovered, ostracizes her from good society.

"The law," says Mr. Justice WOLVERTON in *State v. Sargent*, 32 Or. 110 (49 Pac. 889), "has determined that a female child under the age denominated is incapable of consenting. It is as though she had no mind upon the subject—no volition pertaining to it. There is a period in child life when in reality it is incapable of consenting, and the legislature has simply fixed a time—arbitrarily, as it may be, but nevertheless wisely—when a girl may be considered to have arrived at an age of sufficient discretion, and fully competent, to give her consent to an act which is palpably wrong, both in morals and in law."

The law, therefore, conclusively presumes that a female under the prohibited age is incapable of yielding her consent, and sexual intercourse with her before she reaches the period of mental development is denominated statutory rape, in which actual force is not necessarily an ingredient, and, if alleged in the indictment, may be treated as surplusage: *State v. Horne*, 20 Or. 485; *McComas v. State*, 11 Mo. 116. If the indictment be regarded as charging the defendant with the statutory crime, the allegation that he did "forcibly ravish" her, as contained therein, was a deduction which the law implies from the averment of sexual intercourse between persons of the ages alleged, and amounted to a statement of a legal conclusion, which might have been treated as surplusage; but, in this view of the case, it would have been incumbent upon the state to prove that the defendant was over the age of sixteen years. An indictment charging "that said A B, on the — day of —, 18—, in the county aforesaid, did then and there forcibly ravish one C D, a female," would have stated facts sufficient to constitute the crime of rape: 1 Hill's Ann. Laws, p. 1002, Form No. 7; Id. § 1269; Laws of Oregon, 1895, p. 67. A comparison of the indictment in the case at bar with the forms hereinbefore set out will disclose that it charges two separate offenses, but, the defendant not having demurred for the duplicity, the error was waived; and hence the allegations of the respective ages of the defendant and of the prosecutrix may be stricken therefrom as surplusage, without affecting the conviction: *State v. Abrams*, 11 Or. 169 (8 Pac. 327); *State v. Tom Louey*, 11 Or. 326 (8 Pac. 353); *State v. Horne*, 20 Or. 485 (26 Pac. 665).

It is contended that the evidence was insufficient to identify the defendant as the person who committed the crime, and, this being so, the court erred in not direct-

ing a verdict of acquittal. The testimony of the prosecuting witness is to the effect that, as she was returning from school on the day in question, the defendant, whom she had known from childhood, came up behind her, and inquired if that was the way to a neighbor's house, saying that he had not been in that vicinity for four or five years, and had forgotten the road ; that, after the defendant had thrown her down, she asked him his name, and he replied that it was Johnson, but she says she knew that it was the defendant. On cross-examination, in referring to the person who had assaulted her, she says she told her mother it might be the defendant's cousin, for she did not think it looked like the defendant. The evidence also tends to show that her father was at home when she arrived that evening, and, seeing that she refused to eat any supper and looked ill, he inquired what ailed her, but she only replied that she was sick ; that the girl's mother, being away at the time, reached home the next day, while the daughter was in school, and that the latter did not inform her mother of the assault until she retired that night ; that her father filed an information before a justice of the peace against the defendant and his cousin, separately charging each with the commission of the crime. But he attempts to explain his conduct in this particular by saying that his object in attempting to procure the arrest of the defendant's cousin was to obtain from him evidence which might tend to convict the defendant. It also appears that ill-feeling had existed for several years between the defendant's father and the parents of the prosecuting witness. The testimony of the physicians, who made an examination of the prosecutrix within a few days after she complained of the injury, tends to corroborate her, in so far as the assault upon her is concerned ; and, having testified that it was the defendant who committed

the offense, we think there was sufficient evidence to go to the jury upon the question of his identity, thus leaving the girl's credibility to be determined by them, after considering all the evidence that might tend to impair it, and, having found the defendant guilty, we find no reason for interfering with the judgment, which must be affirmed.

AFFIRMED.

Decided 14 March; rehearing denied 20 June, 1898.

CARSON v. GENTNER.

[52 Pac. 506; 43 L. R. A. 130]

WATERS—CONSTRUCTION OF STATUTES.—The local customs and decisions of Oregon and other western states that he who first changes the course of a natural stream flowing through public lands, which at the time was common to all, and appropriates the water to some useful purpose, thereby acquires a superior right to the same against every claimant except the United States, constitute a modification of the common law, which has been confirmed by both state and national legislation: Hill's Ann. Laws, § 3882 and Rev. Stat. U. S. § 2339.

PUBLIC LANDS—WATERS.—The reservation of vested rights of the owners of ditches provided for by Hill's Ann. Laws, §§ 4057-60, on the issue of patents for land by the state, is not the grant of a new easement, but the recognition of a pre-existing right.

RIGHT OF PRIOR APPROPRIATOR.—A prior appropriator of water from a natural stream flowing through state lands has such a vested right to the use of the water, and to the ditch in which it flows, also constructed on said lands, as will defeat the claim of one who, with notice of the diversion and existence of the ditch, obtains from the state a deed for the premises, without reservation of any water right.

WATERS—DITCH EASEMENT.—A prior appropriator who owns a ditch across lands subsequently patented by the state to another person, has the right to enter on such lands to clean and repair the ditch.*

From Josephine: **HIERO K. HANNA**, Judge.

Suit by **A. H. Carson** against **C. F. Gentner**, and others, to enjoin defendants from interfering with plain-

*NOTE.—See this case in 43 L. R. A. 130 for a collection of authorities under the title right of an appropriator to enter upon the land of an upper proprietor to clean out a ditch.—REPORTER.

33	512
42	57
33	512
46	115
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48	339
48	341

tiff's maintenance of a ditch constructed across their premises. Decree for plaintiff. Defendants appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Davis Brower*.

For respondent there was a brief over the names of *George W. Colvig* and *Robert G. Smith*, with an oral argument by *Mr. Colvig*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is a suit to enjoin defendants from interfering with plaintiff's maintenance of a ditch constructed across their premises. The evidence shows that on December 23, 1859, the Surveyor-General of Oregon approved the plat of the survey of township 37 S., range 5 W. of the Willamette Meridian, whereupon the legal title to section 16 of said township and range became vested in the State of Oregon for the support of common schools: 9 Stat. 323; 11 Stat. 383. In 1868 one Lewis Strong constructed a ditch across the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of said section, and thereby diverted from Board Shanty Creek the waters thereof, which he used in working a mine in section 22, in said township and range; but he having abandoned his improvements, plaintiff, on April 1, 1876, took possession thereof, and with the water flowing in the ditch continued the operation of the mine, during nearly every season, to the commencement of this suit. On November 21, 1883, defendants settled upon the land first above described, through which Board Shanty Creek flows, and thereafter obtained a deed from the State of Oregon for said tract which contained no reservation of

water rights. On November 30, 1892, plaintiff endeavored to go on defendants' land to repair said ditch, but they refused to permit him to do so, whereupon he commenced this suit for the relief hereinbefore stated. The defendants, after denying the material allegations of the complaint, allege that plaintiff never had any license from the State of Oregon to enter upon its school lands, nor had he or his predecessors any privity of interest with the state, by which he or they were authorized to construct or maintain said ditch across the land now owned by them, or to use the waters of said creek. The reply having put in issue the allegations of new matter contained in the answer, a trial was had, and the court found from the evidence that plaintiff was the owner of said ditch, and for more than sixteen years had been in the adverse possession thereof, and was entitled to use the same to carry the waters of Board Shanty Creek, of which he was also entitled to the use, and thereupon perpetually enjoined defendants from interfering with plaintiff's ownership of the ditch and right to enter upon their lands at all times when necessary to repair the same, from which decree defendants appeal.

The question presented for consideration by this appeal is whether a prior appropriator of water from a natural stream, flowing through state lands, has such a vested right to the use of the water and to the ditch in which it flows, also constructed on said lands, as will defeat the claim of one who, with notice of such diversion and existence of the ditch, obtains from the state a deed for the premises, without reservation of any water rights. Defendants' counsel contend that, prior to the appropriation complained of, the State of Oregon was a riparian owner of the land sought to be burdened with the easement, and entitled to have the waters of said stream continue to flow in its natural channel past said land; that

the state, prior to the act of February 24, 1885 (Hill's Ann. Laws, §§ 4057-4060), having conveyed to defendants said premises without reserving any water rights therein, they acquired by their deed the ditch constructed thereon, and also a usufructuary interest in the flow of the waters of said creek in its natural channel; and that plaintiff, not having had possession of the ditch, or the use of the water of said creek, for a period of ten years after defendants' entry, the court erred in restraining them from utilizing their own property. Plaintiff's counsel insist, however, that the ditch in question was constructed in pursuance of a license from the state, upon the faith of which labor and money were bestowed and expended thereon, thus rendering such license irrevocable, and that plaintiff, having been in the adverse possession of the ditch and water flowing therein for more than sixteen years, had in this manner acquired an easement in defendants' premises which entitled him to continue the use thereof unmolested by them.

The doctrine of the common law, that the water of a stream must continue to flow in its natural channel undiminished in quantity and unimpaired in quality, has been very much modified in the territory embraced in the Pacific Coast States, where a new rule, founded upon the necessities under which the early settlers labored, has been inaugurated. So much, only, of the common law was adopted by these settlers as was applicable to the condition of the country in which their lot was cast; and, realizing that water is a powerful agent in separating the precious metals from the baser materials in which they are imbedded, and also serves, when used in irrigating arid tracts, to cause the desert to bud, blossom and bear fruit, and that without the use of such water a vast region must forever remain valueless and uninhabited, necessity compelled these primitive lawgivers to

adopt for their government a code of customs which prescribed the extent of public land each was entitled to, and regulated the manner of appropriating water to the operation of mines and the cultivation of farms, orchards, and vineyards. This latter custom provided that he who first changed the course of a natural stream flowing through public lands, which at the time was common to all, and appropriated the water so diverted to some useful purpose, thereby acquired a superior right to continue the use thereof against every claimant except the United States. The justice of this custom was recognized by the courts, which enforced its provisions in opposition to the doctrine of the common law; and the legislative assemblies of these states, following the example set by the courts, have passed in many instances acts guaranteeing protection to prior appropriators in their possessory rights in the diversion of water against all claimants except the sovereign. The legislative action of this state on the subject is embodied in section 3832, Hill's Ann. Laws, approved October 24, 1864, which reads as follows: "Miners shall be allowed to make local laws in relation to the possession of water rights, the possession and working of placer claims, and the survey and sale of town lots in mining camps, subject to the laws of the United States."

The wisdom of this new rule was finally recognized by congress, which, on July 26, 1866, passed an act, the ninth section of which, so far as applicable to the case at bar, provides "that, whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of the courts, the possessors and owners of such vested rights

shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed:" 14 Stat. 251; Rev. St. U. S. § 2339. It has been repeatedly held that the provisions of the section just quoted only confirm to the owners of ditches and water rights on the public domain the same privileges which they enjoyed under the local customs, laws, and decisions of the courts prior to its passage: *Atchison v. Peterson*, 87 U. S. (20 Wall.) 507; *Basey v. Gallagher*, 87 U. S. (20 Wall.) 670; *Jennison v. Kirk*, 98 U. S. 453; *Broder v. Natoma Water Co.*, 101 U. S. 274.

The custom of appropriating water to a beneficial use has been limited by this court, which holds that the act of congress of July 26, 1866, applies only to government lands: *Curtis v. La Grande Water Co.*, 20 Or. 34 (23 Pac. 808, and 25 Pac. 378, 10 L. R. A. 484). Mr. Justice LORD, rendering the decision of the court in that case, and speaking of the diversion of the waters of a stream claimed to have been made in pursuance of the provisions of the Federal statute above quoted, says: "While that act was passed a year later than the facts show the waters of the creek were diverted, yet it applies only to government land and streams flowing through it. In these, under the circumstances indicated in the act, the prior appropriation of the water may operate to secure a vested right to divert it, which shall be maintained and protected. But it has no application to the lands of individual owners, and, as against them, can confer no right to divert the waters of streams flowing through their lands." In *Alta Land and Water Co. v. Hancock*, 85 Cal. 219 (24 Pac. 645, 20 Am. St. Rep. 217) it is held that a stream flowing through the land of a riparian owner is an appurtenance thereto, which runs with the land as a corporeal hereditament, which might be segre-

gated by grant or condemnation, or extinguished by prescription, but it could not be defeated by simple appropriation. In *City of Santa Cruz v. Enright*, 95 Cal. 105 (30 Pac. 197), it was held that a riparian proprietor of private lands could not acquire any right by mere appropriation to the use of water flowing through his premises. In *Sturr v. Beck*, 133 U. S. 541 (10 Sup. Ct. 350), the facts were that in March, 1877, one John Smith settled upon a tract of public land in Dakota Territory through which False Bottom Creek flowed in a natural channel; that on March 25, 1879, he filed a homestead entry thereon, and, having made final proof in support of his claim on May 10, 1883, obtained from the United States a patent therefor, and in May, 1884, conveyed said tract to Beck; that in June, 1877, Sturr settled on an adjoining tract of public land, filed a homestead entry thereon May 15, 1880, and made final proof in support thereof on May 10, 1883; that on May 15, 1880, Sturr, without any grant from Smith, went upon the latter's claim, located a water right thereon, and constructed a ditch, by means of which he diverted the waters of said creek and appropriated the same to his claim. In a suit by such appropriator against the owner of the tract through which said stream flowed, to enjoin him from interfering with the ditch constructed thereon and the use of the water diverted thereby, it was held that the filing of a homestead entry for a tract of public land across which a stream flows in its natural channel, with no right or claim of right to divert the water therefrom, initiates a right to have the stream continue to flow in such channel without diversion, which ripens into a complete grant upon obtaining a patent therefor, which relates back to the date of filing, and thereby cuts off intervening adverse claims to the water. Mr. Chief Justice FULLER, in rendering the decision of the court,

says: "When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and cannot be subsequently invaded. As the riparian owner has the right to have the water flow '*ut currere solebat*,' undiminished except by reasonable consumption of upper proprietors, and no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy, with intent to appropriate the land, should have the same effect."

In *Vansickle v. Haines*, 7 Nev. 249, it was held that the rights of the defendant, a riparian owner, whose patent for public lands from the United States was issued without reservation of any water rights, and antedated the act of congress of July 26, 1866, was superior to the claim of plaintiff, a prior appropriator of the waters of a natural stream flowing through defendants' land. WHITMAN, J., speaking of plaintiff's claim as a prior appropriator, says: "He acquired no right against Haines, prior to the date of the latter's patent, which could affect that grant, because there was no title in Haines to be affected by acts of the respondent. He could acquire no right against the United States, for, as to that government, he was a trespasser, in that he diverted water from its lands not sought to be pre-empted by him. No presumption of grant arises against the sovereign, and no statute of limitation runs, save in some excepted instances, of which this is not one."

In *Broder v. Natoma Water Co.*, 101 U. S. 274, Mr. Justice MILLER, referring to the right of prior appropriation, says: "It is the established doctrine of this court that rights of miners, who had taken possession of mines, and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural

irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had by its conduct recognized and encouraged, and was bound to protect, before the passage of the act of 1866. We are of the opinion that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one." In *Jones v. Adams*, 19 Nev. 78 (6 Pac. 442), plaintiff was awarded seven-tenths of the waters of a stream flowing through his land, and defendant, an upper riparian proprietor on said stream, the remaining three-tenths,—the trial court having found that each was the first appropriator upon his respective land. Plaintiff, relying upon the rule announced in *Vansickle v. Haines*, *supra*, contended that, inasmuch as the findings of the court showed that he obtained from the United States a patent for his land prior to the act of congress of July 26, 1866, he, as a riparian owner, was entitled to the flow of the waters of said stream in the channel thereof; but HAWLEY, J., denying the point contended for, quotes with approval the above language of Mr. Justice MILLER in *Broder v. Natoma Water Co.*, and says: "The case of *Vansickle v. Haines*, in so far as the same is in conflict with the views herein expressed, is hereby overruled."

In *Lux v. Haggin*, 69 Cal. 255 (10 Pac. 674), it was held that the State of California, on September 25, 1850, became the owner of certain swamp lands situated within its borders; that a prior appropriation of the waters of a stream flowing through such lands was defeated by a subsequent grant of the state of such lands, without reservation; and that the rights of the state are not dependent upon or limited by the decision of the state courts with respect to controversies arising out of prior

appropriations of water from streams flowing through the public lands of the United States. The force of that decision is very much weakened, however, by the very able dissenting opinion of Ross, J., in which he says: "From the foundation of the state, waters pertaining to the public lands of both the Federal and State government have been appropriated and used for mining, agriculture, and other useful purposes. Such appropriation and use was first sanctioned by custom, next by the decisions of the courts, and, finally, by legislative action on the part of the United States, as well as the state. It thus became a part of the law of the land, of which every citizen was entitled to avail himself, and of which every purchaser from the United States, as well as the state, was bound to take notice. In protecting, therefore, the rights of the appropriators of water upon the public lands of the state and of the United States, no wrong is done to the purchasers from either government." Further on in the opinion the learned justice says: "The doctrine of appropriation thus established was not a temporary thing, to exist only until some one should obtain a certificate or patent for forty acres, or some other subdivision of the public land, bordering on the river or other stream of water. It was, as has been said, born of the necessities of the country and its people, was the growth of years, permanent in its character, and fixed the status of water rights with respect to public lands. No valid reason exists why the government, which owned both the land and the water, could not do this. It thus became, in my judgment, as much a part of the law of the land as if it had been written in terms in the statute books, and in connection with which all grants of public land from either government should be read. In the light of the history of the state, and of the legislation and decisions with respect to the subject

in question, is it possible that either government, State or National, ever contemplated that the conveyance of forty acres of land at the lower end of a stream that flows for miles through public lands should put an end to subsequent appropriations of the waters of the stream upon the public lands above, and entitle the grantee of the forty acres to the undiminished flow of the water in its natural channel from its source to its mouth? It seems to me entirely clear that nothing of the kind was ever intended or contemplated."

In *Krall v. United States*, 24 C. C. A. 543, 79 Fed. 241, 48 U. S. App. 351, the officers of the United States, in pursuance of a proclamation of the president in January, 1868, reserved six hundred and forty acres of land from the public domain in Idaho for a military post, through which a stream flowed, and from which a prior appropriation of the waters thereof was made for the use of the government. Thereafter plaintiff went upon the public lands and diverted and appropriated a certain quantity of the water of said stream from a point above the military reservation for the purpose of irrigating his own land; and it was held that the prior appropriation of the government did not defeat the right of a subsequent appropriation by the citizen. Mr. Justice Ross, with whom Mr. Justice HAWLEY concurred, speaking for the majority of the court, says: "The creation of the reservation for military post purposes did not destroy or in any way affect the doctrine of appropriation thus established by the government in respect to the waters of the non-navigable streams upon the public lands. They continued subject to appropriation for any useful purpose. The appropriation of a part of those waters for the use of the military post secured it in the use of the portion so appropriated, but it did not take from others the right to make such appropriation above the reservation as

would not interfere with its prior appropriation." Mr. Justice GILBERT, however, relying upon a *contra* rule, which he maintains was established in the case of *Sturr v. Beck*, 133 U. S. 541 (10 Sup. Ct. 350), dissents from the conclusion reached by his associates.

The legislative assembly of Oregon passed an act, approved February 24, 1885, which granted to any individual or corporation a right of way over all lands belonging to the state, for the construction of water ditches, to be used for irrigation, manufacturing, or mining purposes, and provided that all patents issued by the state for any of its school, university, tide, swamp, or overflowed lands, should be subject to any vested rights of the owners of such water ditches: Hill's Ann. Laws, §§ 4057-4060. This statute was a legislative sanction, confirmatory of the customs of miners, and, like the act of congress of July 26, 1866, was the recognition of a pre-existing right, rather than the granting of a new easement in its real property. Without it the common law of the Pacific Coast States, applicable alike to the arid and mining regions, authorized the diversion of water flowing through public lands of the state, and an appropriation thereof for irrigating and mining purposes; and Strong, having taken advantage of this universal custom, made a diversion and appropriation, but, having abandoned his interest therein, his right reverted to the public, so that, in 1876, when plaintiff took possession thereof, it was the initiation of a new diversion and appropriation, but, having been made prior to defendants's settlement upon the state lands, it is superior to their interests therein, and hence plaintiff is entitled to the relief awarded, so far as it relates to an interference with his right to enter upon defendants' land to clean and repair the ditch.

Counsel for the defendants insist that the court erred

in its conclusion of law that plaintiff was entitled to the use of the water of Board Shanty Creek, claiming that this was not in issue ; but an examination of the answer shows that reference was made to this right, and that the question of such use was involved in the suit, and, this being so, the decree in that respect will not be disturbed. It follows that the decree must be affirmed, and it is so ordered.

AFFIRMED.

Argued 5 January; decided 18 February, 1899.

STATE v. HARPER.

[55 Pac. 1075.]

CRIMINAL LAW—REMARKS OF PROSECUTING ATTORNEY.—Where, on a trial for larceny, a person already convicted of the same theft is introduced by the state, and refuses to testify, it is reversible error for the prosecuting attorney, where there was nothing to show any understanding between the witness and the defendant, to argue to the jury that the guilt of the accused was to be inferred from the refusal of the witness to testify: *State v. Hatcher*, 29 Or. 309, applied.

From Multnomah : THOS. A. STEPHENS, Judge.

Lilly Harper was convicted of larceny, and appeals.

REVERSED.

For appellant there was a brief over the name of *Stott, Boise & Stout*, with an oral argument by *Mr. Geo. C. Stout*.

For the state there was a brief over the names of *Cicero M. Idleman*, attorney-general, and *Chas. F. Lord*, former district attorney, with an oral argument by *Mr. Idleman*, and *Mr. Russell E. Scwall*, district attorney.

MR. JUSTICE MOORE delivered the opinion.

The defendant, Lilly Harper, was indicted for the crime of larceny, alleged to have been committed in the taking and carrying away of the personal property of one Thomas C. Scholes, thirteen \$10 gold coins, lawful money of the United States, each denominated an "eagle," and all of the value of \$130, and also one certificate of deposit issued to the said Scholes by the First National Bank of Portland, Oregon, for the sum of \$500, and of that value, and, upon conviction thereof, was sentenced to imprisonment in the penitentiary for the term of eighteen months. From this judgment she appeals, assigning as error, *inter alia*, the alleged misconduct of the deputy prosecuting attorney. The transcript shows that one Charles Underhill was separately indicted for committing the crime with which defendant was charged, and, prior to her trial, was sentenced, upon his plea of guilty, to imprisonment in the penitentiary for a term of years. At defendant's trial, Underhill, being called as a witness for the state, refused to testify, claiming that his evidence might tend to incriminate him, but, inasmuch as he had already been sentenced for committing the crime, the court required him to answer the questions propounded to him, touching defendant's complicity in the commission of the offense. Underhill, however, persisted in his refusal, and was excused, whereupon the deputy prosecuting attorney, in commenting upon the probable testimony of the witness and his refusal to testify, addressed the jury as follows: "It is legitimate argument. There are three persons that know the fact. One person (Scholes) says that he was with him. Another person (this defendant, accused of the crime) thinks, if she can prove she was not with him, it will probably save her; says she was not with him. The third person is the man who, we say, was her confederate in the commission of this crime. He comes

upon the witness stand. He is sworn as a witness. He attempts to claim the right of refusing to answer because he will criminate himself. He could not criminate himself in this case, because he has pleaded guilty to that, and may be punished and convicted. * * *

Here is a man that knows, gentleman of the jury, whether or not Lilly Harper accompanied him, with old man Scholes, up to Seventh and Couch streets, and there turned him loose. Do you suppose that that man, if he could say that which would help Lilly Harper, would close his mouth and decline to answer, when he is asked these questions? Do you suppose that if that man knows Lilly Harper was not there, that if he knows his answer to that question would save this woman from conviction for this crime, that he would stand here dumb as an oyster and refuse to answer?" Defendant's counsel, interrupting the argument, said: "I wish to move to strike that out,—that last remark,—for the reason that it is not our fault why this man does not testify, and he has no right to argue to the jury any conclusion from that fact, and that we are prejudiced by it." The court refusing to instruct the jury to disregard the language used, an exception to the ruling was saved, whereupon the prosecuting officer, addressing his remarks to defendant's counsel, said: "If you know why Underhill has not testified, I would like to have you tell this jury. If you attempt to tell this jury that Underhill knows this woman was not there, and that Underhill is going to keep his mouth sealed, and, by keeping his mouth sealed, send this woman to the penitentiary, I tell you, if you are going to attempt to make this jury believe that state of facts, you have a stupendous task upon your hands. I tell you, gentlemen, that if this man, Underhill, had never heard of this woman, Lilly Harper, do you believe that if he could say that which would

help her, that he could say that which would save her, that if he was not bound by what he had testified before the grand jury,—and he says he did,—that he would come here, and, when called upon to testify as a witness, answer every question that was put to him by absolutely refusing and declining to answer?”

There is nothing in the record showing that any agreement or understanding had been entered into between defendant and Underhill whereby the latter declined to give any testimony at her trial; and, this being so, her counsel contend that the court erred in permitting the state's attorney, over their objection and exception, to argue to the jury that her guilt was to be inferred from Underhill's refusal to testify. In *State v. Hatcher*, 29 Or. 309 (44 Pac. 584), it is said: “The rule is universal that it is error to allow an attorney, in argument, over his adversary's objection, to go outside the evidence and comment on facts assumed to have been proven, and that an exception to the action of the court in permitting it will be reviewed on appeal.” If it had appeared that the testimony sought to be produced was withheld in pursuance of some agreement entered into between Underhill and the defendant, the argument complained of would probably have been proper, for the statute expressly directs that evidence willfully suppressed creates a disputable presumption that, if such evidence were produced, it would be adverse to the party suppressing it: Hill's Ann. Laws, § 776, subd. 5. In the case at bar, however, it was assumed in the argument, in the absence of any testimony in support thereof, that Underhill had an understanding with defendant by which he refused to testify against her. In *Beach v. United States*, 46 Fed. 754, Mr. Justice FIELD, commenting upon the effect of an agreement made under similar circumstances, says: “We are clear that the court below erred in allowing the

district attorney to argue to the jury that the refusal of Marks to answer certain questions on the ground that his answers might criminate himself, was a circumstance to be considered by them in making up their verdict; that they had a right to consider whether it was not his real object to protect the defendant, and not himself; and that, 'if he was thus particular to protect the defendant,' it must have been from a knowledge that his answers might criminate, not himself, but the defendant. * * *

The refusal of the witness to answer the questions, if he thought his answers would criminate himself, was his constitutional right, which the defendant could not control, and no inference should have been permitted to be drawn against the defendant because of the assertion by the witness of this right to protect himself. Marks was called by the government. If he had testified, his testimony might have been in favor of the defendant, though criminating himself. It might have entirely exonerated the defendant. To infer that the very opposite would have been or might have been the effect of his testimony, had it been given, was unwarranted. * * *

It would, indeed, be strange doctrine that any one could be found guilty, or even that his guilt could be seriously debated, because another party, called as a witness, who had no relations and was not a conspirator with him, or charged in the same indictment, had refused to testify in order to protect himself. There is neither reason nor authority for any such doctrine." The right to invoke the presumption that testimony willfully withheld, would, if produced, be adverse to the party suppressing it, must rest upon the evidence of some agreement or undertaking entered into between the witness and the party by which the operation of the law is thwarted and the administration of justice defeated; and, without some proof of the unlawful agreement, it cannot make any difference

whether the witness refuses to testify through fear of criminating himself, or for any other reason; and to hold otherwise is, in effect, to punish a party for the refusal of a witness to obey the order of a court. The judgment is therefore reversed, and the cause remanded for a new trial.

REVERSED,

Decided 31 October; rehearing denied 19 December, 1898.

JACKSON v. McINNIS.

[54 Pac. 884; 43 L. R. A. 128]

BILLS AND NOTES—SUFFICIENCY OF DEMAND OF PAYMENT.—Presentment and demand of payment made on a receiver *pendente lite* of an insolvent bank and notice of nonpayment by him are insufficient to bind an indorser of a negotiable certificate of deposit issued by the bank before its insolvency.*

From Multnomah: E. D. SHATTUCK, Judge.

Action by Carl H. Jackson against Alexander W. McInnis to recover the amount of a negotiable certificate of deposit that McInnis had indorsed. There was a judgment for plaintiff from which defendant appeals.

REVERSED.

For appellant there was a brief over the name of *George, Gregory & Duniway*, with an oral argument by *Mr. Ralph R. Duniway*.

For respondent there was a brief over the name of *Spencer & Malarkey*, with an oral argument by *Mr. Schuyler C. Spencer*.

MR. JUSTICE BEAN delivered the opinion of the court.

*NOTE.—For another case of presentment to a receiver see *Hutchison v. Crutcher* (Tenn.), 37 L. R. A. 89.

For a case where the notice of dishonor was given to a general assignee of an indorser see, *Amer. Nat. Bank v. Junk Bros.' Lumber Co.* (Tenn.), 28 L. R. A. 492.

—REPORTER.

This is an action by an indorsee against an indorser of a negotiable certificate of deposit, issued by the Portland Savings Bank on October 26, 1894, in favor of the defendant for \$399.76, and by him transferred and indorsed to the plaintiff, for value. After the indorsement, and before the maturity of the instrument, the Portland Savings Bank, becoming insolvent, closed its doors, and a receiver, *pendente lite*, was appointed by the Circuit Court of Multnomah County. Upon the maturity of the paper, presentment and demand of payment was made upon the receiver, and notice of nonpayment given to the defendant; and the only question necessary to consider on this appeal is whether such demand and notice is sufficient to hold the indorser. No authority directly in point has been cited by counsel on either side, nor have we been able to find any; but upon principle the demand in question was, in our opinion, insufficient. The contract of an indorser of a negotiable instrument is that if, when duly presented at maturity, the paper is not paid by the maker, he—the indorser—will, upon notice of dishonor, pay the same to the indorsee or other holder. It is a collateral and conditional contract, governed by the technical rules of the law merchant; and a demand of payment upon the maker or drawer and notice of nonpayment are conditions precedent to the indorser's liability. It would seem necessarily to follow, therefore, from the very nature of the contract, that the presentment for payment must be made to the person whose duty it is to pay, or to an agent or person duly authorized to act in the premises: 1 Daniel, Neg. Inst. § 588; Tiedeman, Com. Paper, § 313. Now, the receiver *pendente lite* of a corporation is not the agent of the corporation, nor is it his duty to pay or discharge any of its obligations, except as he may be directed by the court. He is an officer of the court, to preserve and distribute the assets

of the insolvent corporation, and has no power other than that conferred upon him by the order of his appointment, or such as may be derived from the general practice of the courts of equity in such cases: High, Rec. § 1; *Farmers' Loan Co. v. Oregon Pac. R. R. Co.*, 31 Or. 237 (38 L. R. A. 424, 65 Am. St. Rep. 822, 48 Pac. 706). A demand upon him for the payment of the debts of the corporation would, therefore, be a useless proceeding, because he has neither the power nor authority to pay them. That duty still rests upon the corporation, notwithstanding its insolvency and the appointment of a receiver. Neither of these events amounts to a dissolution of the corporation, nor relieves it from the duty of paying its obligations: *Bank of Bethel v. Pahquioque Bank*, 81 U. S. (14 Wall. 383); *Decker v. Gardner*, 124 N. Y. 334 (11 L. R. A. 480, 26 N. E. 814); *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1 (16 Sup. Ct. 439). It continues to exist as a corporate entity, and its insolvency constitutes no excuse for neglect to make due presentment for payment of its paper, or to give notice of dishonor to an indorser thereof: *Hawley v. Jette*, 10 Or. 31 (54 Am. Rep. 129).

The case of *Armstrong v. Thruston*, 11 Md. 148, is quite analogous to the case in hand, and supports the conclusion to which we have arrived. In that case the demand of payment was made upon an assignee of the maker of the note for the benefit of creditors, and it was held that it was not sufficient, because the insolvency of the maker did not excuse demand and notice, and the assignee was not his agent, nor was it his duty to pay the note; and the court say no case has been found in which a demand of payment on a person standing in such a relation to the maker of the note has been held sufficient. The case of *Ballard v. Burton*, 64 Vt. 387 (16 L. R. A. 664, 24 Atl. 769), cited by the defendant, is not in point. That

was an action against a person who joined with the bank as maker of a certificate of deposit, and his undertaking was to pay the plaintiff the amount called for by the certificate when it, properly indorsed, should be returned to the bank. Before its maturity, the bank failed, and the question was whether a return of the certificate to the receiver was a sufficient compliance with the terms of the contract. There was no question in the case as to the rights or liabilities of an indorser, and no discussion or consideration of that question. The same may be said of the case of *Hutchison v. Crutcher*, 98 Tenn. 421 (37 L. R. A. 89, 39 S. W. 725). That was an action against an indorser of a note executed by a third person, payable at a certain bank; and the bank being, at the maturity of the note, in the hands of a receiver, it was held by a divided court that the place of payment was at the office of the receiver, and not at the building formerly occupied by the bank. It follows from these views that the demand for payment made by the plaintiff upon the receiver of the Portland Savings Bank was insufficient to charge the defendant as indorser, and the judgment of the court below must be reversed, and the case remanded for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

ON REHEARING.

PER CURIAM. The petition for rehearing contains a very able reargument of the questions heretofore submitted to and decided by the court, but, nevertheless, we see no reason to change our opinion. The suggestion that the decision handed down is unsatisfactory, because it does not indicate upon whom and how protest of paper issued by a bank which afterwards goes into

the hands of a receiver should be made, is sufficiently answered by saying that no such question was involved in the case, or necessary to its decision. The point in controversy was whether the demand of payment actually made was sufficient to charge an indorser, and not upon whom such demand should have been made.

REHEARING DENIED.

Argued 20 February; decided 27 February, 1899.

STATE v. BRANTON.

[56 Pac. 267]

1. **INDICTMENT—PRINCIPAL AND ACCESSORY.**—Under Hill's Ann. Laws, §§ 1280, 2011, abrogating the distinction between principals and accessories, and providing that all persons, whether committing a crime or aiding and abetting in its commission, shall be indicted and tried as principals, the conviction of one person charged as principal in the commission of a crime does not operate as an acquittal of another separately charged as principal in the commission of the same crime: *State v. Kirk*, 10 Or. 505; *State v. Moran*, 15 Or. 262, and *State v. Steeves*, 29 Or. 85, cited.
2. **CONSTITUTIONAL RIGHT OF ACCUSED—INDICTMENT.**—The guaranty to an accused person by the Oregon constitution, article I, § 11, of the right to demand the nature and cause of the accusation against him is not infringed by charging an accessory before a crime as though he had directly committed the criminal act: *State v. Steeves*, 29 Or. 85, approved.
3. **VENUE—EVIDENCE OF LOCATION.**—The exact location of the boundary line between two counties is immaterial upon the question whether a crime was committed in the county in which the indictment was found, where any location of the boundary line that is claimed would place the scene of the crime in the county in which the indictment was found.
4. **SUFFICIENCY OF EVIDENCE.**—The testimony in this case is such as to require the case to be submitted to the jury, and a motion to direct an acquittal was properly overruled.
5. **EVIDENCE—ACCOMPLICE.**—Under Hill's Ann. Laws, §§ 1280, 2011, abrogating the distinction between principals and accessories, and providing that an accomplice may be indicted and tried as a principal, evidence that defendant was an accomplice is sufficient to sustain a conviction under an indictment charging him as a principal.
6. **CHARGE TO JURY.**—It is not error to refuse requests for special charges, the substance of which was given in the general charge.
7. **INCONSISTENT INSTRUCTIONS.**—A defendant cannot complain that charges are contradictory when he asked for them.

8. WHEN CHARGE ON INSANITY MAY BE GIVEN—An instruction on insanity is justified when defendant offers testimony tending to show that he was insane, although there was no such plea. Under the Oregon statutes a plea of insanity is inadmissible, but such defense is interposed whenever the defendant introduces testimony tending to show the state of his mind when the crime with which he was charged was committed.

From Lane : J. W. HAMILTON, Judge.

The defendant, Claude Branton, was convicted of the crime of murder in the first degree, alleged to have been committed in Lane County, June 15, 1898, by killing one John A. Linn, and, having been sentenced to be hanged, he appeals, assigning as error the action of the trial court in denying him leave to withdraw his plea of not guilty to enable him to demur to the indictment, in refusing to direct the jury to acquit him, and in giving certain instructions. The defendant pleaded not guilty when arraigned, and thereafter, but before he was tried, one Courtland Green was separately indicted for the crime of murder in the first degree, alleged to have been committed by killing the same person, to which he entered a plea of guilty, whereupon defendant moved the court for leave to withdraw his plea so that he might demur to the indictment returned against him, but, the motion being overruled, an exception was saved.

AFFIRMED.

For appellant there was an oral argument by *Mr. W. C. Hale*, and a brief urging these points :

It is earnestly contended that, under the form of these two indictments, the plea of guilty entered by Green operated as an acquittal of defendant Branton of the alleged crime of murdering John A. Linn, or, in other words, it operated as a complete vindication of the law for the commission of the single crime charged separately against this defendant and Green, and therefore

the state could proceed no further in the prosecution of this single charge of crime after a verdict or plea of guilty was entered against any person separately charged with the full commission of said crime. Such was the rule at common law, and our statute has not changed the rule in this state under the facts of this case. The statute, §§ 1289 and 2011, has provided that all persons concerned in the commission of a crime are principals, and shall be indicted, tried and punished as such. Under these statutes, either indictment for the crime charged, on the point that each was separately charged as a principal without reference to the other, was good as against the person first convicted of the crime charged; but after the plea of guilty entered by Green and accepted by the court, the prosecution of the defendant was ended, the law satisfied and the entire case closed as to the defendant.

Now, if Green killed Linn, and he pleaded guilty to the indictment charging him singly with the full and complete crime of murdering Linn, then of course in the eyes of the law this defendant could not have killed Linn. If one man kills another and is convicted of the crime by plea or verdict of guilty it is absurd to say in a court of law that still another person killed deceased, while the plea or verdict of guilty stands of record. Under the record in this case and the indictment against Green, it was the duty of the court to grant the defendant's motion to withdraw his plea of not guilty and demur to the indictment against him. Had this been done, then the court could have properly passed upon this question and given the defendant the right granted by the constitution by resubmitting the case to the grand jury for an indictment stating "the nature and cause of the accusation against him." The nature of the accusation would be the part he acted in the alleged crime, if

any, and the "cause" of the accusation would be that the defendant did, in some manner, aid, assist or abet Green in the crime of killing Linn, making him a principal under sections 1289 and 2011, or facts making him an accessory after the fact, under section 2012. This is a legal and constitutional right, and its refusal was an error materially affecting the substantial rights of the defendant. .

The point here made has never been adjudicated by this court, and is open for a full and fair consideration and adjudication. In *State v. Kirk*, 10 Or. 505, and in *State v. Steeves*, 29 Or. 85, the various sections of the statute were considered and construed in reference to these particular cases, but it must be borne in mind that in each of these cases the parties concerned were jointly indicted with others, and hence the indictment was full notice and specification of the appellant's participation in the crime charged, and therefore not decisive of the point raised in this case. In *State v. Moran*, 15 Or. 262, Dan Moran and one James Kelley were separately indicted for the murder of one Kaluscha. Kelley was first put on trial and acquitted, and thereafter Moran was tried and convicted, and appealed from the judgment of conviction, which was affirmed. This decision is in no way decisive of the question raised in the present case, for the reason that Moran was the first and only person convicted in that case.

The court erred in denying defendant's motion for a new trial on the ground of the insufficiency of the evidence to support a verdict of guilty. The only evidence introduced that defendant killed Linn is the evidence of Green. Before defendant was put on trial Green pleaded guilty of murder in the first degree for killing the same person, John A. Linn. By some means, springing from some cause, and in disregard of section 1403, Hill's Code,

he escaped the death penalty and was given that of life imprisonment. This man Green, represented by counsel throughout, goes upon the witness stand with his plea of murdering Linn fresh from his mouth, and, against objection, solemnly swears that he did not kill Linn, but that the defendant killed him. This fact alone would cause a prudent man to hesitate before believing him. To show that Green's evidence was false and absolutely unworthy of belief, it is only necessary to briefly notice a few of his untruths uttered against the defendant in Green's attempt to hurl the defendant into eternity for his (Green's) own confessed crime, to save himself from like fate. * * * Take this evidence of Green in connection with the motion of the district attorney and his associate, which shows on its face that immunity was promised Green by the state, and the logical conclusion of any fair mind must be that Green entered his plea under an assurance of safety from the gallows, and that the state in its zeal to hang some one became at least a passive party to the scheme, with a willingness born of desire.

For the state there was an oral argument by *Messrs. D. R. N. Blackburn*, attorney-general, *George M. Brown*, district attorney, and *L. T. Harris*, with a brief urging this point.

. The appellant, Claude Branton, was severally indicted by the grand jury of Lane County, Oregon, on the 26th day of October, 1898, charged with the crime of murder in the first degree by killing John A. Linn on the 15th day of June, 1898, in said Lane County. On the day that the indictment was returned into court, the defendant was arraigned, entered his plea of not guilty the following day, and thereafter was duly convicted of mur-

der in the first degree as charged in the indictment, and was sentenced according to law. There was no reference to the complicity of Branton or any one else in the commission of Green's crime, contained in said indictment by innuendo or otherwise. Each separate indictment contained the statement of a complete crime charged against each of the defendants. The theory of the prosecution was, and it is borne out by the evidence in the record, that Branton and Green were both actually present, aiding and abetting each other in the commission of the criminal act of killing Linn; that the criminal act that took the life of the deceased was in law the act of each individually as well as of both; that the distinction between principal in the first and second degree has not only been abolished by statute in this state, but had been recognized as a distinction without a difference in practice prior to the adoption of the constitution everywhere in this country, excepting in a few states having statutes recognizing a distinction.

The contention of the state was and still is that murder, unlike riot, is a several crime; that in a crime like murder the criminal can be indicted alone, tried alone, and the full penalty be inflicted on him the same as though he committed the crime unaided; that a criminal action is unlike a civil action. The defendant in a criminal matter cannot be heard to say that another wrongdoer has met his obligation. The guilt of one is neither mitigated nor enhanced from the fact that another may be also guilty. The purpose of the civil suit is to compel the defendant to compensate the plaintiff for what he has unjustly suffered, while that of the criminal is punishment, and the cure of a public wrong. Therefore, in a civil case, however numerous the wrongdoers, the plaintiff is to be remunerated for his sufferings only once; in a criminal one, where each is as

guilty as though the other were not guilty also, and nothing is for pay but all is for punishment, the full penalty is to be inflicted on each the same as though he had committed the crime unaided. The law may proceed precisely as though he were the only participant in the act.

The only pleading by a defendant is either a demurrer or a plea. Of pleas there are these: Guilty, not guilty, former conviction or acquittal. Of demurrers there are five, and the causes of them must appear on the face of the indictment. Now the indictment does not state that Green had pleaded guilty, and there is no provision for such a plea, from which it would seem that the statutes of Oregon do not contemplate that it shall be a defense for the defendant to plead that some other fellow has been convicted or acquitted of the crime charged; the only plea is, has the defendant himself been convicted or acquitted of that crime.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1. It is contended by defendant's counsel that under the form of these indictments Green's plea of guilty was a complete vindication of the law for the commission of the single crime with which he and Branton were separately charged, and operated as an acquittal of the latter, and that the court therefore erred in refusing to permit him to withdraw his plea. By sections 1289 and 2011, Hill's Ann. Laws, passed in 1864, it is provided that "the distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated, and all persons concerned in the commission of a felony, whether they directly commit the act constituting the crime, or

aid and abet in its commission, though not present, must hereafter be indicted, tried, and punished as principals, as in case of a misdemeanor;" and that "all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime, or aid and abet in its commission, though not present, are principals, and to be tried and punished as such." There appears to be no question as to the form of the indictments under these provisions, or their sufficiency to support a judgment against the party first convicted thereunder; but it is urged that, after Green's plea had been accepted, the law's demands were fully satisfied, which precluded the state from further proceeding against defendant under the form of indictment which it adopted; and that, if it sought to charge him separately as an accomplice, he was entitled, under the organic law of the state, "to demand the nature and cause of the accusation against him:" Const. Or. art. I, § 11.

This court has held that an indictment which charged as principal a party whom the state sought to prove was present aiding and abetting, or who counseled and procured another to commit, a felony, was not violative of the clause of the constitution relied upon (*State v. Kirk*, 10 Or. 505; *State v. Steeves*, 29 Or. 85, 43 Pac. 947); but it is insisted that neither of these cases is decisive of the question under consideration, for in each instance the party sought to be convicted as an accessory was jointly indicted with his alleged principal. So, too, in *State v. Moran*, 15 Or. 262 (14 Pac. 419), it was held that an indictment charging an accomplice as principal did not violate the fundamental law of the state; but it is maintained that the decision in that case is not controlling in this, for there the alleged principal had been acquitted before the accessory was tried. Where more than one

join in the commission of an offense which is not necessarily several, all or any number of them may be jointly or separately indicted therefor. Wharton Cr. Pl. (8th Ed.) § 301; Bishop New Cr. Proc. § 463; *State v. O'Brien*, 18 R. I. 105 (25 Atl. 910). "We take the general rule to be," say the court in *Commonwealth v. Griffin*, 3 Cush. 523, "that in every indictment against two or more the charge is several as well as joint,—in effect, that each is guilty of the offense charged; so that, if one is found guilty, judgment may be passed on him, although one or more may be acquitted." To the same effect, see, also, *Commonwealth v. Brown*, 12 Gray, 135. So, too, a joint indictment against all who participate in the commission of a crime is, in effect, a several indictment against each. *State v. O'Brien*, 18 R. I. 105 (25 Atl. 105).

2. Defendant's counsel, in support of the point contended for, rely upon the case of *State v. Gifford*, 53 Pac. 709, in which it was held by the supreme court of Washington, under a clause of the constitution of that state (section 22, article I) identical with ours, that an information charging defendant as principal with the commission of the crime of rape is not supported by evidence that he was an accessory before the fact, and that, notwithstanding the Code of that state (section 1189) abrogates the distinction between an accessory before the fact and a principal, the information was in contravention of the organic law of the state, which provides that the accused shall have the right to demand the nature and cause of the accusation against him. It would seem that the decision in that case, without referring thereto, has been virtually reversed by the more recent case of *State v. Webb*, 55 Pac. 935, in which Mr. Justice REAVIS, speaking for the court, says: "Defendant also urges that the information

charges the defendant with the crime of robbery as a principal, and that the evidence of the prosecuting witness shows that the defendant could only be guilty of that of principal of the second degree. It is a sufficient answer to this contention to state that the distinction between accessories and principals in the first and second degree is abolished: 2 Ballinger's Ann. Codes & Stat. § 6782 (2 Hill's Code, § 1189). And there was no material variation between the information and the proof. Defendant was charged as principal, and was convicted as such." In *State v. Geddes*, 55 Pac. 919, the supreme court of Montana criticise the decision relied upon, and hold that a clause of the constitution of that state which guarantees to the accused the right to demand the nature and cause of the accusation (Const. Mont. article III, § 16) is not violated by an indictment which charges the defendant as principal, under an act of the legislative assembly which provides that persons aiding and abetting a crime, although not present, must be prosecuted as principals, "and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal," when the person so accused was not present at the commission of the offense. True, the defendant in that case was jointly indicted with others, but, since a joint indictment is equivalent to a several indictment against each, it must follow that several indictments charging different parties with the commission of the same offense is tantamount to a joint indictment against all. We conclude from the foregoing that a demurrer upon the ground stated would be without merit, and could not be rightfully sustained, and, this being so, the defendant was not deprived of any substantial right by the court's refusal to permit him to withdraw his plea.

3. It is maintained that the court erred in refusing to direct the jury to acquit defendant, because the proof failed to show that the crime was committed in Lane County. The testimony tends to show that Linn was killed at Isham's Corral, a point on the road leading from Sisters, in Crook, to McKenzie River, in Lane County, about four miles west of the summit of the Cascade Mountains. It is urged that the boundary between Crook and Lane Counties has not been designated by the legislative assembly, and that it is therefore impossible to say whether the crime was committed in the county in which defendant was tried. Lane County was created January 28, 1851, by an act which provided: "That all that portion of Oregon Territory lying south of Linn County, and south of so much of Benton County as is east of Umpqua County, be, and the same is hereby created and organized into a separate county, by the name of Lane County." Statutes of a Local Nature of Oregon, 1851, p. 32; Hill's Ann. Laws, § 2267. Linn County, to which reference is made, was described by referring to another county as follows: "Section 1. That the southern boundary of Champoege County be located in the following manner: Commencing in the middle of the channel of the Willamette River, opposite the mouth of the Santiam River, thence up said river to the north fork; thence up said fork to the Cascade Mountains; thence due east to the summit of the Rocky Mountains. Section 2. Be it enacted: That all that portion of Oregon Territory lying south of Champoege and east of Benton County be and the same is hereby called Linn County,"—approved December 28, 1847. Laws of General and Local Nature, Collected and Published Pursuant to an act of the Legislative Assembly Passed January 26, 1853, p. 55. It will thus be seen that the eastern boundary of Lane County as originally

established was the summit of the Rocky Mountains. A portion of Lane County was thereafter included within Wasco County, the boundary of which was originally given as follows: "That so much of the said Territory of Oregon as is bounded as follows, to-wit: Commencing at the cascades of the Columbia River, thence running up said river to the point where the southern shore of said river is intersected by the southern boundary of Washington Territory, thence east along said boundary to the eastern boundary of Oregon Territory; thence southerly along the eastern boundary of said territory to the southern boundary of the same, thence west along said southern boundary to the Cascade Mountains, thence northerly along said range of mountains to the place of beginning, be and the same is hereby created and organized into a separate county, to be called Wasco County,"—passed January 11, 1854. Special Laws Passed by the Legislative Assembly of the Territory of Oregon at the Fifth Regular Session Thereof, p. 26; Hill's Ann. Laws, § 2283.

It will be seen that a doubt exists as to the original location of the western boundary of Wasco County, but the legislative assembly undoubtedly understood that it extended to the summit of the Cascade Range, for an act passed by that body December 22, 1853, defining the southern boundary of Lane County, reads as follows: "That the southern boundary of Lane County shall be located as follows: Commencing on the Pacific Coast, at the mouth of the Siuslaw, on the south bank, thence following up the south bank of said stream, to a point fifteen miles west of the main traveled road, known by the name of the Applegate Road, thence southerly to the summit of the Calapooia Mountains, thence eastward along the summit of said mountains to the summit of the Cascade Range": Sp. Laws, p. 13. The southern

boundary so established is almost identical with the line as located by the act of November 19, 1885 (Hill's Ann. Laws Or., § 2268). It will be seen that the southern boundary of Lane County was located twenty days prior to the establishment of Wasco County, but both measures were probably under consideration by the legislative assembly when the former act was passed. Crook County was established February 22, 1885, and its boundaries defined by beginning at a certain point on the western boundary of Wasco County, and running thence by certain courses to a point designated as the southeast corner of the newly-organized county; "thence due west to the east line of Lane County; thence along the east line of Lane and Linn Counties to the place of beginning": Hill's Ann. Laws, § 2254. Whether the boundary line between Crook and Lane Counties runs along the said east line or along the summit of the Cascade range of mountains, the crime was committed within the latter county, and hence the court had jurisdiction of the action.

4. It is contended that no testimony was introduced at the trial tending to prove defendant's participation in the killing, except that of Courtland Green, who testified that Branton shot deceased while he was asleep, and, he being a confessed accomplice, and his evidence not having been corroborated in any manner, the court erred in refusing to direct the jury to acquit the defendant. The defense was conducted upon the theory that Green did the killing without the knowledge or intent of Branton, who became an accessory after the fact only by the part he took in attempting to shield the principal from the consequences of his act. The defendant, appearing as a witness in his own behalf, testified that about two or three days prior to the time he and Green left the Wil-

lamette Valley to go to Gilliam County—March 13, 1898—the latter, speaking in relation to the prospect of forming a partnership with Linn in raising horses, expressed an intention of killing the deceased; the witness, in answer to the question, “You may state what conversation you ever had with Mr. Green, if any, touching the matter of any injury or evil intentions towards Linn, and when and where they were,” saying: “The first he wanted to go in with Linn. He said, ‘If you will get in with Mr. Linn, we will get away with him after a while.’ I asked him what he meant. He said, ‘The old man may not look any better, but he will be better off.’” He also testified that, after having arrived at their destination, Green said to him: “‘I won’t stand this Eastern Oregon dust any longer, and only work for \$15. I want a horse, and, if this one wasn’t branded, I would take this.’ He wanted a horse, and, if he could get out with Linn, and drive over there, and do him up. ‘Do you mean to do that?’ He said, ‘Do you suppose I could get this horse?’ I did not believe he had any such intention before I left there.’” Defendant, in speaking of what Green said to him about Linn, just before leaving for the Willamette valley, says: “He said: ‘Would there be any harm in putting the old man away? He would be better off.’ I said, ‘Courty, do you mean that?’ He said, ‘No, I don’t.’ I said, ‘The old man is well known, and it is out of the question.’ He said, ‘Of course it is.’”

The witness also says, in substance, that on June 6, 1898, he and Green left Condon, with Linn, who was driving a band of horses, seeking to obtain better pasture for them, and expecting to find it in Crook County; that, having reached said county, they persuaded Linn to drive his horses west of the mountains, and, having reached Isham’s Corral, near the summit, on June 15, they camped for the night, and, while Linn was sleeping

by the fire, Green shot him as the witness was approaching the camp with a pail of water ; that Green thereupon placed the body of his victim upon the fire, and helped to procure fuel, but the next morning, the bones not being entirely consumed, he aided Green in breaking them with an ax, and buried the pieces beneath a rock, where they were found, and recognized as human bones ; that Green took Linn's money, and other valuables, and, after having left the scene, gave the money to the witness, who, in order to protect Green, tried to personate Linn by making whiskers from the hair of a horse's mane, which he wore at night as he called upon a person with whom he left the horses to be pastured, and to whom he represented that his name was John Linn. The evidence of other witnesses also shows that defendant tried to persuade several persons to testify that they had seen Linn west of the Cascade Mountains, offering them various sums of money ; and telling others that they could have their choice from the band of horses which he and Green were driving if they would testify that they bought them from a man whom he described as about 40 or 45 years old, having sandy hair and red whiskers, stating that they need have no fear of being contradicted in their testimony, as the person so described would never appear against them ; and also urged the persons whom he solicited to testify in his behalf not to say anything about his proposal, as he had got into trouble which might cost him his life. Branton's own admissions corroborate the testimony of Green so far as the killing of Linn is concerned, and he must have known the intention of the principal long before the crime was committed. Whether he fired the fatal shot was a question for the jury, under all the circumstances surrounding the case, and hence the court com-

mitted no error in refusing to direct a verdict of acquittal on this ground.

5. The defendant asked the court to give the following instruction: "I instruct you that it is incumbent upon the state to show by proof beyond a reasonable doubt that the deceased came to his death at the hands of the defendant. The state must show not only that the injury inflicted upon the deceased by the defendant, if any, was the probable cause of the death of the deceased, but that it was the immediate and efficient cause of his death; and the evidence must establish this fact to your satisfaction beyond a reasonable doubt, and, if this has not been done, then you must find the defendant not guilty,"—which was given with the following qualification: "That if the defendant was acting, aiding, and assisting in the commission of the criminal act of killing, if any such act was committed, and all the elements exist to sustain the crime of murder in the first degree, then any doubt as to the fact of which of two persons, the defendant or an accomplice, inflicted the mortal injury, would not be such a fact or doubt as would avail the defendant. You are to consider whether or not this crime, or any degree of it, has been committed by the defendant, though his part may have been aiding, assisting, and abetting the other in the act, under the instructions I have given you." An exception having been taken, it is insisted that the court erred in accompanying the instruction with this qualification. The exception is undoubtedly based upon the theory that evidence of defendant's complicity, as an accomplice, in the commission of the crime, was inadmissible under the form of the indictment, and, such being the case, the qualification was erroneous; but, having held that the indictment properly charged the defendant as principal, no error was committed by the court in the respect complained of.

6. The court refused to give certain other instructions asked by the defendant, but, without quoting them, we think that such portions of them as were proper were substantially given in the general charge.

7. It is also insisted that certain other instructions are contradictory, but, inasmuch as they were given at defendant's request, he cannot complain of their inconsistency.

8. The defendant having introduced evidence to show that his mental condition was weak, that he was easily influenced by people whom he liked, that his memory was defective, that he had an aunt in the insane asylum, and an uncle and a cousin who were insane, the court, of its own motion, gave the following instruction: "Where the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt. If a party, notwithstanding some disease or infirmity, still has reason enough to know the act which he proposes to commit is wrong and unlawful, and knows its nature and quality, and has left the power of deliberation and premeditation, and the power to do or refrain from doing the act charged as a crime, such mental disease will not avail as a defense. In other words, while the law will not punish a man for an act which is the result of, or produced by, mental weakness, it will punish him for an unlawful act, not the result of, or produced or influenced by, mental disease, even though some mental unsoundness is shown to have existed." An exception to that portion of the charge having been saved, it is contended that, inasmuch as no plea of insanity was interposed, the evidence introduced by the defendant upon that branch of the subject did not justify the court in giving it.

It is argued that this instruction assumed that de-

fendant killed the deceased, and left to the jury the consideration of only one question, namely, that of the defendant's mental condition at the moment the act was committed, and, the burden being cast upon him of proving his want of responsibility, the jury had no alternative but to find the verdict which was returned. The only pleading on the part of the defendant in a criminal action is either a demurrer or a plea: Hill's Ann. Laws, § 1320. Pleas to an indictment are of three kinds: (1) Guilty, (2) not guilty, and (3) a judgment of former conviction or acquittal: Id. § 1331. All matters of fact tending to establish a defense to the charge specified in the indictment, other than those specified in said third subdivision, may be given in evidence under the plea of not guilty: Id. § 1336. If the defense be the insanity of the defendant, the jury must be instructed, if they find him not guilty on that ground, to state that fact in their verdict: Id. § 1389. It will be seen from these excerpts that under our statute a plea of insanity is inadmissible, but that a defense of that character is interposed whenever the defendant introduces in evidence testimony tending to show the state of his mind when the crime with which he is charged was committed. Such testimony is rarely offered, however, unless the evidence produced by the state tends to prove that the defendant was present at, or participated in, the commission of the offense. In the case at bar, defendant admitted, when on the stand as a witness, that he was present when Linn was shot, and that he helped Green procure fuel to burn his body. After these admissions had been made, it was sought to counteract their very damaging effect by introducing testimony showing defendant's tendency to mental alienation resulting from a pre-existing cause, and, such testimony having been introduced, it was incumbent upon the

court to instruct the jury in relation to their verdict, and, the court having discharged its duty in this respect, no error was committed in giving the instruction complained of, and hence the judgment is affirmed.

AFFIRMED.

Decided at PENDLETON, 13 August, 1898.

BOND v. TURNER.

[44 L. R. A. 490; 54 Pac. 158]

CONSTRUCTION OF EXEMPTION LAWS.—Exemption statutes have no extra-territorial operation, and do not form any part of the contract between debtor and creditor, being merely a part of the remedy.

EXEMPTION — NONRESIDENT.—The right to claim the benefit of statutory exemptions is open to nonresidents as well as residents, unless there is some restriction, which is not the case with section 282, Hill's Ann. Laws.

From Umatilla: STEPHEN A. LOWELL, Judge.

Replevin by Ellen G. Bond against D. Turner and Rudolph Martin for certain household furniture. Plaintiff had a judgment, from which defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *John J. Balleray* and *Marion A. Butler*, with an oral argument by *Mr. Balleray*.

For respondent there was a brief over the name of *Carter & Raley*, with an oral argument by *Mr. J. H. Raley*.

MR. JUSTICE BEAN delivered the opinion.

This is an action commenced in the Circuit Court of Umatilla County, to recover the possession of some household furniture seized by the defendant, Turner, on the

twenty-sixth day of May, 1897, to satisfy an execution issued on a judgment recovered by the defendant, Martin, against the plaintiff in the Justice's Court for North Pendleton Precinct. The facts are that for some time prior to the seventeenth day of May, 1897, the plaintiff had been a resident and householder within the City of Pendleton, engaged in keeping a boarding house; but, about the time mentioned, she closed her business, and concluded to move to Rossland, B. C., where her husband then was. Preparatory to such removal, she delivered her household furniture to a railway company at Pendleton, for shipment, expecting to follow it in three or four weeks. After the furniture had been received by the company, it was attached by Turner, under a writ of attachment issued in the action brought by Martin; and, on the nineteenth of May, the plaintiff commenced an action against the defendants in the Justice's Court for East Pendleton Precinct, to recover possession thereof, on the ground that the property in question was exempt from execution, and recovered judgment therein on the twenty-sixth. On the same day, Martin caused an execution to issue on the judgment which had in the meantime been recovered by him against the plaintiff in the action referred to, and caused the property in question to be again seized by the defendant, Turner, under such execution, whereupon this action was commenced in the circuit court to recover its possession. The defense to the action is (1) that such property was not exempt from execution at the time of its seizure, because the plaintiff was not then a resident and householder of the state; and (2) that the judgment in the action brought by her against the defendants on the nineteenth of May is a bar to this proceeding. The jury returned a verdict for plaintiff.

Upon the first point the court charged the jury that subdivision 4 of section 282 of the statute exempting

from execution the goods, furniture, and utensils of a householder, could be taken advantage of only by residents of the state. It then proceeded to instruct them as to what would and would not constitute a "resident," within the meaning of this rule, and the errors assigned on this branch of the case are based upon the giving and refusal of instructions upon this point. But we do not deem it necessary to examine the errors so assigned, for, in our opinion, the judgment must be affirmed on the ground that the property was exempt from execution, whether plaintiff was a resident of the state or not. The statute provides that "household goods, furniture, and utensils to the value of \$300" shall be exempt from execution "if owned by a householder and in actual use or kept for use by and for his family, or when being removed from one habitation to another on a change of residence": Hill's Ann. Laws, § 282, subd. 4. It is not limited either in terms or by necessary implication to citizens or residents of the state, and the courts have no right to so restrict it by judicial interpolation. Exemption statutes are, of course, confined in their operation to the state in which they are enacted. They have no extraterritorial effect, nor do they constitute a part of the contract between the debtor and creditor which may be enforced in another jurisdiction. But they are a part of the law of the forum, and regarded as relating to and affecting the remedy only. It would therefore seem logically to follow that such a statute must extend its protection to all litigants in the courts of the state where it is enacted, whether residents or not, unless it is expressly or impliedly restricted to some designated class of persons.

As said by Mr. Justice WILLIAMS in *Haskill v. Andros*, 4 Vt. 609 (24 Am. Dec. 645): "Whatever remedy our laws give to enforce the performance of a contract will

equally avail the citizen or the foreigner; and they equally must be subject to any restraints which the law imposes upon them. Our inhabitants can have no greater rights in enforcing a claim against a foreigner than an alien can have in enforcing a similar claim against one of our own citizens. Whoever submits himself or his property to our jurisdiction must yield to all the requirements which are made of our citizens in relation to the collecting of debts or maintaining suits, and is clearly entitled to all the benefits, exemptions and privileges to which other debtors or suitors belonging to our own state are subject or entitled. If the one can hold a cow, suitable wearing apparel, and necessary household furniture, without having the same taken from him by execution, so can the other. Nothing short of the express language of a statute would justify us in saying that a person may, by virtue of an execution, be stripped of his wearing apparel, his necessary household furniture, and his only cow, merely because he resides under another government, when a person residing here would not be subject to the same inconvenience and distress." And the great weight of authority is in favor of the rule thus laid down. It seems to be quite generally agreed that, where the statute does not restrict the exemption of property from execution to residents or some other designated class of persons, the courts have no authority to do so, and it must apply to all persons, litigant nonresidents as well as residents. Thus, in the case of *Lowe v. Stringham*, 14 Wis. (*222) 241, the debtor was a nonresident, and it was held that he was entitled to the benefit of the exemption laws of the state, the court saying: "The statute makes no discrimination between temporary and permanent residents, nor does it purport to confine its privileges to residents at all. It exempts certain articles of the debtor and his family.

And we think it would be entirely inconsistent with the beneficent intentions of the statute, as well as with the dignity of a sovereign state, to say that the temporary sojourner, or even the stranger within our gates, was not entitled to its protection."

In *Mineral Point Railroad Co. v. Barron*, 83 Ill. 365, the defendant in the original action was a resident of the state of Wisconsin, and claimed the benefit of the Illinois statute (Rev. St. 1874, chapter LXII, § 14) which provided that "the wages and services of a defendant, being the head of a family and residing with the same, to an amount not exceeding the sum of \$25, shall be exempt from garnishment"; and it was held that he was entitled to the benefit of such statute. Again, in the case of *Sproul v. McCoy*, 26 Ohio St. 577, the court say: "Exemptions from execution or sale allowed to 'every person who has a family,' under the provisions of the act of April 16, 1893 (70 Ohio Laws, p. 132), may be claimed by any debtor against whom an action is prosecuted in the courts of this state, whether such debtor be or be not a resident of this state." And to the same effect are the cases of *Mo. Pac. Ry. Co. v. Maltby*, 34 Kan. 125 (8 Pac. 235); *Kansas City, etc. Railroad Co. v. Gough*, 35 Kan. 1 (10 Pac. 89); *Bell v. Indian Stock Co.* (Tex. Sup.) 11 S. W. 344 (3 L. R. A. 642); *Wright v. Chicago, etc. R. R. Co.* 19 Neb. 175 (56 Am. Rep. 747, 27 N. W. 90); *Menzie v. Kelly*, 8 Ill. App. 259; *Wabash Railroad Co. v. Dougan*, 142 Ill. 248 (34 Am. St. Rep. 74, 31 N. E. 594); *Hill v. Loomis*, 6 N. H. 263. In some of the states the right of exemption is expressly limited to residents, and such are the provisions of the statutes under which the decisions cited by the appellant were made.

As to the other defense pleaded, it is sufficient to say that the judgment in the justice's court was upon a sep-

arate and distinct cause of action from the case in hand, and is therefore no bar to this action. The judgment of the court will therefore be affirmed.

AFFIRMED.

Decided 28 January; rehearing denied 18 March, 1899.

STATE v. OLBERMAN.

[55 Pac. 886]

TRIAL—DISQUALIFICATION OF JURORS FOR BIAS.—The fact that proposed jurors stated on their *voir dire* that they had read an account of the inquest held over the body of the person for whose murder defendant was on trial, which purported to give the testimony of witnesses before the coroner's jury, and the verdict of such jury, and that they had heard the matter discussed, and, from what they had read and heard, had formed some opinion as to the guilt or innocence of defendant, will not disqualify them if it appears that the opinion was not of a fixed and determined character: *Kumli v. So. Pac. Co.*, 21 Or. 505, and *State v. Brown*, 28 Or. 147, cited.

ERROR MUST APPEAR IN THE RECORD.—Before the appellate court can undertake to correct an alleged error it must appear in the record that the error actually occurred.

TRIAL—MISCONDUCT OF JURY.—A conviction in a capital case will not be set aside because, after having been ordered kept together during the trial, three jurors, accompanied by a bailiff in charge of the jury, separated from the rest, and went into a saloon, in which there was only one person, and drank liquor, nothing being said by anyone concerning the case.

IDEM.—It will not be set aside because, at another time during the trial, two jurors separated from the others, and, accompanied by a bailiff, went to their respective residences, neither of them going out of sight of the bailiff, and immediately returning to the other jurors, without conversing about the case with anyone, or hearing any statement in reference thereto.

IDEM.—The fact that jurors drink intoxicating liquors during the trial will not invalidate a conviction even in a capital case, unless it appears that such drinking probably affected their verdict.

IDEM.—The mere fact that the direction of the court that the jury be kept together during the progress of the trial has been violated is not cause for reversal, if it appears that their verdict was not improperly influenced.

From Douglas : J. C. FULLERTON, Judge.

J. M. Olberman was dissatisfied with a conviction of murder in the first degree and appeals.

AFFIRMED.

33	556
135	485
33	556
38	204
43	216
33	556
46	489

For appellant there was a brief over the names of *O. P. Coshaw*, *Andrew M. Crawford*, and *Cake & Cake*, with an oral argument by *Mr. Crawford* and *Mr. Harry M. Cake*.

For the state, there was a brief over the name of *Geo. M. Brown*, district attorney, with an oral argument by *Mr. Cicero M. Idleman*, attorney-general, and *Mr. Brown*.

MR. JUSTICE BEAN delivered the opinion.

This is an appeal from a judgment of the Circuit Court of Douglas County upon a conviction of the defendant of murder in the first degree. The record contains several assignments of error, but the principal ones relied upon at the hearing relate to the action of the trial court in overruling the defendant's challenge to the jurors Hadley and Curry for actual bias, and the alleged misconduct of the court and jury during the progress of the trial. We have, however, in view of the consequences of an affirmance, examined with care all the assignments of error, and are clear that the judgment must be affirmed. The jurors Hadley and Curry stated, during their examination on their *voir dire*, that they had read in the local newspaper an account of the inquest held over the body of the man for whose murder the defendant was on trial, which purported to give the testimony of the witnesses before the coroner's jury, and the verdict of such jury, and that they had also heard the matter of the homicide frequently discussed, and from what they had read and heard each had some opinion as to the guilt or innocence of the defendant. But it quite clearly appears from their examination that their opinion was not of such a fixed and determined character as to render the action of the trial court in overruling the challenge reversible error. It was held

in *Kumli v. Southern Pacific Co.*, 21 Or. 505 (28 Pac. 637) and *State v. Brown*, 28 Or. 147 (41 Pac. 1042), that the qualification of a juror, when challenged for actual bias, is largely a question for the trial court, and that its decision will not be disturbed on appeal unless the want thereof clearly appears from the record; but there is nothing in this record to indicate that Hadley and Curry had formed such an opinion that they could not in law be deemed impartial. It does not appear who testified before the coroner's jury, nor what testimony was given, so that it cannot be said from the record that the knowledge which these jurors received from reading the account of the proceedings before the coroner was such, as a matter of law, as would disqualify them from sitting on the jury.

It is next claimed that, during the progress of the trial, and while the closing argument for the state was being made, the judge retired from the court room, and the trial proceeded in his absence. If the record disclosed that the alleged facts upon which this objection is based were true, we should not hesitate to reverse the judgment, for it is clear that there can be no court without the presence of the judge, and it is particularly important that he should be visibly present, and control the entire proceedings, during the progress of a trial in which the defendant's life is at stake: 1 Thompson, Trials, § 212; *Smith v. Sherwood*, 95 Wis. 558 (70 N. W. 682); *Hayes v. State*, 58 Ga. 35; *State v. Beuerman* (Kan. Sup.) 53 Pac. 874. But the record does not show the facts upon which the objection is predicated. There is no recital or statement whatever in the bill of exceptions upon this point. It is true that there is copied into the bill what would seem to have been a motion for a new trial, based upon the irregularity of the court, prosecuting officer, and jury, and certain affidavits which were prob-

ably used on the hearing thereof ; but they are in no way identified, nor is there any certificate or statement that they are the motion and affidavits so used. And, besides, the affidavits in reference to the conduct of the judge are contradictory, leaving the question of fact wholly undetermined. There is no finding of the court thereon, and, if any inference is to be drawn from its action in overruling the motion, it is that the charge is untrue. Error cannot be presumed. In order, therefore, to entitle the defendant to have the judgment reversed upon the point suggested, it should affirmatively appear that the judge in fact absented himself from the court room during the progress of the trial, and there is no such finding or statement in this record.

The same might with propriety be said with reference to the alleged misconduct of the jury. There have been copied into the bill what purport to be divers and sundry affidavits in relation to this matter, but they are in no way identified, and there is no statement that they are the affidavits used on the motion to set aside the verdict, nor does it even appear that they were ever filed in the court, or used at the hearing of any matter connected with the trial of the cause now before us. But, in view of the importance of this case, we are disposed to waive this point, and to assume that the question sought to be presented is properly here. The most that can be claimed from the showing made is that, after the jury had been impaneled and sworn, the court ordered them into the custody of two bailiffs, with instructions to keep them together during the progress of the trial ; that one morning, before the final submission of the case, three of the jurors, by the consent and accompanied by one of the bailiffs, went into a saloon, and, after taking one drink of liquor each, immediately returned to their fellow jurors ; that the only person in the saloon at the time

was the proprietor, and nothing was said by any one concerning the case on trial ; that at other times two of the jurors, accompanied by one of the bailiffs, were permitted to go to their respective residences, a short distance from the court house, on an errand, immediately returning to the other jurors ; that neither of these jurors was out of the sight or hearing of the bailiff, nor did they converse with any one about the case on trial, or hear any conversation or statement in reference thereto.

Now, these facts do not constitute such misconduct of the jury as justify disturbing their verdict. The mere fact that the direction of the court to keep them together during the progress of the trial was violated, does not give the defendant the right to have their verdict set aside, when, as in this case, it appears that there was nothing in their conduct, nor any circumstances connected therewith, calculated to improperly influence their verdict. It was discretionary with the trial court, in the first instance, as to whether they should be allowed to separate or not (*State v. Shaffer*, 23 Or. 557, 32 Pac. 545), and its direction to keep them together was for the purpose of warding off improper influences ; but the failure to comply with such order does not give to the defendant the right to any exception for error or misconduct, when it appears that the verdict was not improperly influenced thereby. Nor does the mere drinking of intoxicating liquors by jurors invalidate a conviction, even in a capital case, unless it appears that such drinking in some way probably affected their verdict : *Kerr*, Hom. § 377 ; 2 *Thompson*, Trials, § 2569 ; *State v. Cucuel*, 31 N. J. Law, 249 ; *People v. Bemmerly*, 98 Cal. 299 (33 Pac. 263). Whether the officers and jurors should have been punished for contempt in violating the orders of the trial court was a question for that court, but their conduct in this regard is not sufficient ground alone for disturbing

the verdict. We conclude, therefore, that the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Argued 6 April; decided 20 June, 1898.

MCCOURT v. JOHNS.

[58 Pac. 601]

38	561
135	149

SUFFICIENCY OF TENDER—While section 852 of Hill's Ann. Laws, makes a written offer to pay a particular sum, if not accepted, equivalent to an actual production and tender of the money, it does not dispense with readiness and ability to make the tender good: *Ladd v. Mason*, 10 Or. 308, applied.

VENDOR AND PURCHASER—RESCISSION OF CONTRACT OF SALE—A vendee will not be allowed to rescind a contract for the sale of land where the vendor, without fraud or neglect, is unable to convey title to an insignificant portion, not essential to the enjoyment of the balance for the purpose intended, and it cannot be said that but for such portion the vendee would not have made the contract.

SPECIFIC PERFORMANCE—A court of equity will require specific performance by a purchaser, although the vendor is unable to give title to ten acres out of a tract of 224, where the portion to which the defective title appertains does not affect the value and reasonable enjoyment of the remainder for the purpose for which it was intended, and the vendor consents to a ratable reduction in the price.

RESCISSION OF SALE BY VENDEE—LIENS—A purchaser cannot rescind his contract for the purchase of land because there are liens upon it amounting to less than the purchase price, since he could retain their amount from the purchase money, and especially so where this necessity is obviated by a tender of proper releases.

RESCISSION BY VENDEE—LACHES—Where the vendee of land, in possession under a bond for a deed, retains possession without complaint for a long period of time after learning that the vendor is unable to convey title to an insignificant portion of the land sold, and until the time of performance on his part arrives, such laches will generally constitute a waiver of the right to rescind.

From Marion: HENRY H. HEWITT, Judge.

Suit by James McCourt against George W. Johns and others for a rescission of a contract for the sale of land and an accounting. There was a cross bill by defendants, asking a foreclosure of a mortgage subsequently executed, and a sale of the property, etc. From a decree in favor of defendants, plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Prescott & McCourt*, with an oral argument by *Mr. John McCourt*.

For respondent there was a brief and an oral argument by *Messrs. William H. Holmes* and *George G. Bingham*.

MR. JUSTICE WOLVERTON delivered the opinion.

On September 16, 1891, the plaintiff became the owner, by mesne assignments and transfers, of a certain bond for a deed made, executed and delivered by George W. Johns and Julia A. Johns, widow, to Edward Snell, June 21, 1886, whereby, in consideration of the sum of \$7,255.52, to be paid by him on June 21, 1896, without interest, and that he would assume the payment of \$1,000 and accumulating interest due the school fund of the State of Oregon, they obliged themselves to convey to the said Snell or his assigns, certain real property situate in Marion County, Oregon, described as containing 229.32 acres. Snell executed his note for the said sum of \$7,255.52, conditioned as by the bond indicated, and prior to its maturity he and his assigns paid the amount due the school fund, and \$255.52 upon the note. On the twenty-eighth day of September, 1895, in a suit then pending in the Circuit Court of the State of Oregon for Marion County, against James McCourt, the plaintiff herein, and George W. and Julia A. Johns, two of the defendants herein, and others, it was duly adjudged and decreed that the Salem Improvement Company and other plaintiffs therein were the owners in fee and entitled to the possession of 6.28 acres of said land, thereby ousting McCourt and the said Johns therefrom. It was further decreed therein that McCourt and the

Johns pay the costs of suit, amounting to \$426. It is shown by the testimony that the said George W. and Julia A. Johns were not the owners nor entitled to the possession of another small parcel of such premises, containing 4.90 acres ; and it is further apparent that, by an error of computation, the number of acres mentioned in the bond is 3.75 acres in excess of the actual acreage according to the description. On June 20, 1896, plaintiff made to defendants George W. and Julia A. Johns an offer in writing to pay the amount remaining due upon said promissory note, and to perform all the conditions of said bond on his part, to be accepted by defendants at their option on either the twentieth, twenty-first or twenty-second days of the same month, and notified them of the absence of title to the several parcels hereinbefore alluded to, and of their inability to convey the same, and that if they were unable or unwilling to convey to plaintiff a good and sufficient title to all the lands described in such bond, and surrender full possession thereof, he would rescind their contract, and demanded of defendants repayment of all moneys paid under the terms of the bond, together with the reasonable value of all improvements made upon the premises during the time of its occupancy by the plaintiff and his predecessors. On the same day defendants offered to deliver to plaintiff a deed executed by them covering the lands described in the bond, and on the tenth day of July, 1896, the defendant George W. Johns tendered to the plaintiff a warranty deed to all the lands described in the bond, in accordance with its terms and conditions, together with a release of the mortgage executed by George W. Johns to Julia A. Johns, and a deed from the Salem Improvement Company of all its interest in and to said premises, and demanded the payment of the amount due upon the \$7,255.52 note, and notified

plaintiff in writing that he was ready and willing to comply with all the terms and conditions of said bond. The plaintiff refused to accept the deeds and releases, and failed to pay the sum demanded, but notified defendants of his rescission of the contracts. George W. Johns assigned his interest in the \$7,255.52 note to Julia A. Johns, and thereafter, on December 31, 1886, to secure the payment of a certain other promissory note of \$10,500, with interest at six per cent. per annum, due from him to the said Julia A. Johns, he made, executed and delivered to her a mortgage upon all his interest in the premises described in the bond. Subsequently another mortgage was given for the purpose of correcting some errors discovered in this one. The releases above referred to were intended as a discharge of both these mortgages. Prior to the commencement of this suit, the said Julia A. Johns became indebted to the defendant John Hughes, and, to secure the payment of such indebtedness, she indorsed and assigned to him the said notes of Snell and George W. Johns, and the mortgage securing the latter.

The plaintiff prays a decree declaring a rescission of the bond or contract of sale, for the recovery of the part of the consideration paid, and for an accounting and recovery for expenditures made in improving the premises. The court below decreed, in accordance with the prayer of the defendants, a foreclosure of the bond and of the mortgage subsequently executed, and directed that the proceeds arising from a sale of the premises under such foreclosures be applied: *First*, to the payment of the costs of suit; *second*, to the payment of the said indebtedness of Julia A. Johns to the defendant John Hughes; *third*, to the payment of the Salem Improvement Company's claim for costs in the former suit; and, *fourth*, to the payment of the balance due on said

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bond to Julia A. Johns, after deducting the foregoing claims, and the overplus, if any remains, to the plaintiff. To reverse the decree, the plaintiff prosecutes this appeal, wherein two questions are presented for our consideration: (1) Was plaintiff's alleged tender of payment in writing sufficient; and (2) was he entitled to a rescission of the contract by reason of the inability of George W. and Julia A. Johns to convey a good title to a small portion of the premises described in the bond.

As it pertains to the first, the defendants tender a distinct issue in their answer, in the following language: "Admit that plaintiff, on or about the nineteenth day of June, 1896, made to the defendants George W. Johns and Julia A. Johns an offer in writing, substantially as pleaded in their complaint, but these defendants say that the said offer in writing was not made in good faith, and the said plaintiff was not able at said time to pay the sums of money due upon said bond, or any part thereof." The plaintiff's own testimony disposes of this question, as it shows a failure to establish a valid tender. He says, in substance, that he engaged the money of John Savage; that Savage was to let him have \$30 per acre upon the bottom land, provided the title was good; but, when informed that the title was bad, he refused to make the loan. This clearly shows that plaintiff was not prepared to make his tender good, if the defendant had accepted the offer and been prepared to have complied with his demand in its minutest detail. The statute (§ 852, Hill's Ann. Laws) has provided that "an offer in writing to pay a particular sum of money is, if not accepted, equivalent to an actual production and tender of the money"; but it was not the intention of the legislature thereby to dispense with the readiness and ability on the part of the one making the tender to pay in substantial accord with its terms. It was so held

in *Ladd v. Mason*, 10 Or. 308, and the rule there established is decisive of the question here. From the fact that the plaintiff knew, at the time of the alleged tender, that the defendants Johns could not comply with the conditions of the bond by conveying a good title to all the premises described therein, it is evident he had no intention of having the money ready for acceptance on the part of the Johnses, nor was he able at the time to make good the terms of his written tender.

This brings us incidentally to another question. It is urged that, by reason of the Johns' inability to convey a good title to all such premises, a tender of the unpaid consideration was not indispensable to the right of the plaintiff to rescind the contract, and this depends upon the disposition of the second question above outlined. It was proven that an error of 3.75 acres was made in computing the acreage from the description contained in the bond. There was a failure of title to 6.28 acres, recovered by the Salem Improvement Company and others, and to an additional 4.90 acres known as the "O. & C. R. R. Tract," which, in the aggregate, makes a diminution from the original estimate of 14.33 acres, leaving a tract of 214.39 acres, touching the title to which there is no dispute, except that it is subject to the lien of the Salem Improvement Company's judgment of \$426, and the mortgage given by George W. to Julia A. Johns for \$10,500. It is not of much importance to determine whether the sale which is the subject of the present controversy is one in gross or by the acre, because, if it is one in gross, the small difference of 3.75 acres in the estimated acreage upon which the amount of the consideration was probably based is so slight in comparison with the total that it does not lead to a presumption of mistake or fraud; and, none such being pleaded, there could be no relief for this cause. If, however, the sale

was by the acre, the respondents have consented to an abatement of a proportionate amount of the purchase price, which they could properly do, it not appearing that the exact acreage bargained for was a material incident in superinducing the purchase. That is to say, the purchase was not made for any specific or particular purpose whereby the exact quantity of land estimated to be contained in the tract described became a material element in the transaction: See *Seligmann v. Heller Clothing Co.*, 69 Wis. 410 (34 N. W. 233); *Harrison v. Talbot*, 2 Dana, 258; *Graham v. Larmer*, 87 Va. 222 (12 S. E. 389).

Making allowance for the error in calculation, there is left yet 10.03 acres to which the respondents are unable to convey good title. Ought the plaintiff to be now permitted to rescind his contract, and recover back the purchase money paid, together with his expenses for improvements, because of such inability of the respondents to fully comply in this respect with the terms and conditions of their undertaking? There is no intimation of fraud in connection with the transaction, and it is simply a case where the obligors find themselves unable to comply strictly with their obligation, without design and apparently without willful neglect, they believing at the time of its execution that they possessed a good title to all the premises, and had lawful right to convey the same. The principle or rule of law applicable here is that, if it should appear that the part or portion of the entire subject-matter is so essential or material to the enjoyment of the residue that it cannot reasonably be supposed the purchase would have been made without it, the contract should be dissolved in toto. Chancellor Kent says: "The good sense and equity of the law on this subject is that if the defect of title, whether of lands or chattels, be so great as to render the thing sold unfit

for the use intended, and not within the inducement to purchase, the purchaser ought not to be held to the contract, but be left at liberty to rescind it altogether": 2 Kent's Com. *475, *476. But if, however, the part to which the defective title appertains is small, or inconsiderable in comparison with the whole, and does not affect the value and reasonable enjoyment of the remainder for the purposes for which it was intended, and is susceptible of compensation, the vendee will not be permitted to rescind, or, rather, which is the equivalent in principle, may, upon a ratable abatement of the purchase price, be required in a court of equity to specifically perform: *Pomeroy*, Spec. Performance, § 453; *Foley v. Crow*, 37 Md. 51-60; *Stoddart v. Smith*, 5 Binney, 355; *D' Wolf v. Pratt*, 42 Ill. 198; *Towner v. Tickner*, 112 Ill. 217; *Buck v. McCaughtry*, 5 T. B. Mon. 217-230.

It appears from the evidence that the premises in question were chiefly valuable for dairy purposes, for which they were purchased by Snell, and that the two tracts or parcels aggregating 10.03 acres were covered with gravel, and of small value. These parcels are inconsiderable in comparison with the whole tract purchased, constituted no special inducement to the purchaser, and are not necessary to the ample enjoyment of the remainder for the purposes intended. There was some contention that a portion of the land to which defective title appertains subsequently proved to be of peculiar value, because of the deposits of sand and gravel thereon, and its proximity to the City of Salem, and that it was of especial advantage to the remaining portion of the premises as giving access to the Willamette River, but this was not sustained by the evidence, if it may be said otherwise to have become important to a determination of the controversy. It is apparent, therefore, that under the rule, the plaintiff was without legitimate

grounds upon which to base a rescission of the contract as against unwilling vendors, and this disposes also of the contention that a tender of the purchase price remaining due was unnecessary because the defendants were unable to comply strictly with their engagements. In so far as the judgment lien may affect the question, the plaintiff could have retained sufficient of the balance of the consideration due to have discharged it (Pomeroy, Spec. Performance, section 452), but the necessity for this was obviated by a tender of a release of such judgment, as well as a discharge of the mortgage lien, which removed any cause for complaint arising from these incumbrances.

There is, however, another feature of the controversy which militates against the plaintiff's position. He has long been aware of the defective title to these parcels, but, with this knowledge, he has remained in full possession of the premises, and enjoyed the advantages and benefits to be derived therefrom, without complaint, and made no attempt to rescind, or effort to be relieved from the situation, until performance on his part became necessary under the contract. When cause exists for rescission, the law requires the party seeking to take advantage of it to act without delay, so that the other party to the contract may be placed as nearly in *statu quo* as possible; and a nonobservance of the rule will generally constitute a waiver of the right to rescind: *Foley v. Crow*, 37 Md. 51. Upon the whole, it seems more equitable that plaintiff should be required to make compensation, with abatement of the purchase price to cover error and loss by inability of defendants to convey title, than that he should be permitted at this late date to rescind when it is impossible to measurably place all parties to the transaction in *statu quo*. The decree of the court below is in accord with this principle, and, having properly

marshaled the assets to arise from sale of the premises under foreclosure of the bond and mortgage, it should be affirmed, and it is so ordered.

AFFIRMED.

Decided 3 April, 1899.

STATE v. MAGONE.

[56 Pac. 648]

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CRIMINAL LAW—FORMER JEOPARDY.—Acquittal of a charge of malicious destruction of personal property of another, under Hill's Ann. Laws, § 1779, is no bar to a prosecution for the illegal disinterment of a human body or the remains thereof, under section 1875, though the former prosecution related to the casket in which it was inclosed: *State v. McCormack*, 8 Or. 236, and *State v. Howe*, 27 Or. 138 distinguished.

From Multnomah: MELVIN C. GEORGE, Judge.

The facts out of which the present controversy rises are in brief, as follows: The defendant was indicted May 25, 1897, for the crime of illegal disinterment. The indictment charges "that the said Daniel Magone, on the eighteenth day of May, A. D. 1897, * * * did willfully, feloniously, and wrongfully dig up and disinter a human body, towit, the dead body of one W. S. Ladd, deceased, which said dead body * * * [the said Daniel Magone] did willfully, feloniously, and wrongfully take, remove and carry away." Upon conviction thereof, in June, 1897, he was sentenced to the penitentiary for a period of two years, but upon appeal to this court the judgment was reversed in November following: 32 Or. 206 (51 Pac. 452). After the appeal had been taken, and while the case was pending here, towit, on the first day of July, 1897, he was again indicted for the malicious destruction of personal property. This indictment charges that "The said Daniel Magone, on the eighteenth day of May, A. D. 1897, * * * did will-

fully and feloniously, maliciously and wantonly, injure a certain coffin, the personal property of C. A. Ladd and others, by then and there feloniously, maliciously, and wantonly cutting, sawing, and splitting and breaking, said coffin, and the glass in the top thereof, by the use of certain hooks, saws, spades, and other tools to the grand jury unknown, thereby fracturing, cracking, and breaking the glass in the top of said coffin, and cutting and breaking the top and sides and lining, and otherwise injuring and damaging said coffin." When the latter case was called for trial, the defendant, in connection with his plea of "Not guilty," entered a plea of former conviction for the same crime charged in the indictment, setting up the conviction had on the indictment for illegal disinterment. The jury found in his favor upon the latter plea and defendant was accordingly discharged. Subsequently, and after the mandate had gone down from this court, the case at bar was brought on for hearing; and the defendant, by leave of the court first had and obtained, interposed a plea of former acquittal, setting up his acquittal upon the indictment for malicious destruction of personal property; and when at the trial the judgment roll, showing the indictment, plea, trial, and verdict in such case, was offered in evidence, an objection was made, and sustained by the court, which held, as a matter of law, that the two offenses were not the same, and former jeopardy in the one constituted no defense on the trial of the other, and instructed the jury that they must find for the state upon the plea of former jeopardy. The defendant, having been convicted, and judgment entered upon the conviction, again appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Julius C. Moreland*.

For the state there was a brief over the names of *Russell E. Sewall*, district attorney, and *Roscoe R. Giltner*, with an oral argument by *Mr. D. R. N. Blackburn*, attorney-general, and *Mr. Sewall*.

MR. CHIEF JUSTICE WOLVERTON, after making the foregoing statement of facts, delivered the opinion.

The only question presented by the appeal is whether the acquittal of defendant upon the charge or indictment for malicious destruction of personal property is a bar to the prosecution on the second trial, under the indictment for illegal disinterment. The injury to the coffin was accomplished by the defendant while in the act and during the course of the disinterment and removal of the body of the late W. S. Ladd, for which offense the defendant was indicted and convicted. While the judgment in the latter case was in force the defendant was put on his trial for the injury to the coffin. To the indictment therein preferred he interposed the plea of former conviction of the same offense, referring to the judgment then standing against him for the illegal disinterment, and in this he was successful before the jury. Now, the judgment in the case at bar having been reversed on the former appeal, the defendant, upon his second trial, by leave of the court, interposed a plea of former acquittal because of his acquittal upon the charge of malicious injury to personal property, and it is urged that the court erred in not giving effect to the plea. The case presents a novelty in logic, and, at first blush, would seem to present the nonlogical fallacy of *petitio principii*. In the first instance, it is said the

defendant ought to be acquitted because he has been convicted upon another indictment for the same offense ; and, in the second, that the defendant ought to be acquitted because he has been acquitted of the same offense ; and yet the indictment to which the plea of *autrefois acquit* is interposed is the same upon which the former conviction was had, which conviction formed the basis of his plea of *autrefois convict*. But, however the logic may strike one, we presume that, if the defendant has secured an acquittal upon a mistrial for the same offense, the acquittal would furnish ground for the plea of *autrefois acquit* upon the retrial in the cause wherein the mistrial was had ; for we must not lose sight of the constitutional guaranty that “ no person shall be tried twice for the same offense.” Both the plea of former conviction and former acquittal are founded alike upon that great principle and fundamental maxim of criminal jurisprudence that no man shall be twice put in jeopardy for the same offense. This is one of the ancient and well-established principles of the common law ; and the constitutional guaranty was wisely designed to sanction its enforcement : *Com. v. Roby*, 12 Pick. 496.

There is not only a seeming but irreconcilable conflict in the authorities touching what elements or ingredients, and the nature thereof, are requisite to constitute what is termed in book lore “the same offense,” and we will not at this time attempt the bootless task of reconciling them. Mr. Chief Justice BEAN, in *State v. Howe*, 27 Or. 138 (44 Pac. 672), says : “Many tests have been announced by which the question as to when the offense is the same can be determined, but their application must necessarily depend largely upon the facts of each particular case.” Coming to the present controversy, BIDDLE, J., in *State v. Elder*, 65 Ind. 282, laid down a rule which has impressed us as sound, and from which one

may be adduced appropriate and applicable to its solution. He says: "When the same facts constitute two or more offenses, wherein the lesser offense is not necessarily involved in the greater, and when the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act." And this he supports by a strong array of authorities. The rule was formulated in a case wherein the defendant was first tried for the greater offense, and his acquittal thereof was pleaded as a bar to a trial on the lesser. We have here the reverse of the proposition; but it must be conceded that the rule should apply with even greater force, as, if the greater crime does not bar the less, the less ought not to be permitted to bar the greater. Mr. Freeman, in his learned monographic note to *Roberts v. State*, 58 Am. Dec. 540, states the rule in a general form as follows: "Where, out of the same act, offenses of a different nature arise, susceptible of distinct and characteristic proof, they constitute distinct offenses, and the defendant may be tried twice, or as many times as there are such distinct offenses." As illustrative of the rule, see *State v. Gapen*, 17 Ind. App. 254 (45 N. E. 678), wherein it is held that "to try one for selling liquor in quantities less than a quart without a license permitting it, after an acquittal on a prosecution for selling to an infant founded on the same sale, is not putting him twice in jeopardy 'for the same offense.'" So, in *State v. Gapen*, 17 Ind. App. 254 (47 N. E. 25): "A person is not put in jeopardy twice 'for the same offense' where he is acquitted on the charge of selling liquor to a minor and is subsequently tried for a sale without a license; the proof necessary to convict of the offense charged in the second prosecution not being sufficient to convict in the first prosecution, though

the offenses were committed by one act." So, also, in *Dominick v. State*, 40 Ala. 680: "An acquittal under an indictment for the larceny of goods is no bar to a subsequent prosecution for obtaining the goods by false pretenses, although the same evidence is adduced by the prosecution in each case." And in *State v. Ross*, 4 Lea, 442, it is decided that "a plea of former conviction for the unlawful disturbance of a religious assembly 'by loud noise, profane discourses, and indecent behavior' is no defense to an indictment for an assault with intent to commit murder in the second degree by shooting at a person named with a loaded pistol, although the loud noise of the previous indictment may have been the report of the pistol in the shooting of the last indictment." See, also, *Irvin v. State*, 7 Tex. App. 78; *Morgan v. State*, 34 Tex. 677; *Territory v. Willard*, 8 Mont. 328 (21 Pac. 301); *Ruble v. State*, 51 Ark. 170 (10 S. W. 262); *Blair v. State*, 81 Ga. 629 (7 S. E. 855); *State v. Wheeler*, 62 Vt. 439 (20 Atl. 601); *Wilson v. State*, 24 Conn. 57; *Freeland v. People*, 16 Ill. 380; *State v. Martin*, 76 Mo. 337.

The two offenses with which we are at present dealing are quite distinct, one from the other. "If any person shall willfully and wrongfully dig up, disinter, remove, or convey away any human body, or the remains thereof," the act constitutes an illegal disinterment (Hill's Ann. Laws Or. § 1875); while if he "shall maliciously or wantonly, in any manner or by any means, not otherwise particularly specified in this chapter, destroy or injure any personal property of another," he commits an entirely different crime: Hill's Ann. Laws Or. § 1779. Now, it is perfectly patent, as was said by one of the witnesses, that it was possible for the defendant to have disinterred and stolen the body from the grave with the casket without breaking or mutilating it in the least, and the casket may have been injured without disinterring

the body. The ingredients, or constituent elements of the two offenses are essentially different, and the same proof is not necessary for the establishment of the one which is essential to the support of an indictment for the other. It is no doubt true that, in proving the commission of one of these offenses, enough might be elicited from the witnesses to establish the other; but this could not make the two offenses one in fact and in law: *Teat v. State*, 53 Miss. 439.

In support of defendant's contention, much reliance appears to have been placed upon the following language of Mr. Chief Justice BEAN in *State v. Howe*, 27 Or. 138 (44 Pac. 672): "The question is not so much whether the defendant has been tried for the same act, or whether the facts alleged in the second indictment would have warranted a conviction on the first, as it is whether he has been put in jeopardy for the same offense, or some part or constituent element thereof." In support of the position, a quotation is made from the note of *Roberts v. State*, 58 Am. Dec. 537, as follows: "The offenses charged in the two indictments must be substantially the same, or, as we shall see, they must be of the same nature or species, so that the proof of the one involves the proof of the other, or such that one is a part or constituent element of the other." The term "constituent element," when applied to crimes, signifies an essential or necessary ingredient; and when two offenses are so related as to have an essential or necessary ingredient common to both, and the proof of one involves the establishment of the other, then a conviction or acquittal of either is a bar to a prosecution for the other; so that the language upon which special stress is laid has relation, and can only apply, where there are different degrees of the same crime, such as murder in the first and second degree and manslaughter, or where, from the very na-

ture of the transaction upon which the charge or indictment is laid, the one offense cannot be committed without involving the commission of the other also, as is illustrated by the case of *State v. McCormack*, 8 Or. 236. The defendant in that case was indicted for and convicted of the larceny of a saddle and bridle. Subsequently he was indicted for the larceny of a horse stolen at the same time and by the same act, and it was held that the transaction constituted but one crime. The constituent element of the one charge was the essential ingredient in the other; hence there was but one offense: *Wilcox v. State*, 6 Lea, 571, is another illustration, wherein it was held that a conviction of robbery is a bar to an indictment for an assault to commit murder growing out of the same offense, as the assault and violence is a common element of both cases.

The intended meaning of the language employed becomes manifest if further recourse is had to the same monographic note of *Roberts v. State*, 58 Am. Dec. 537. The author says (page 545): "Every offense of the same generic class,—that is, of the same nature,—though varying in the degree of the offense growing out of the same transaction, must each contain the same common, essential elements; and again, in establishing the less offense, all the circumstances of the transaction will be proved, and the whole offense committed will be placed before the jury. The acquittal will, therefore, be, in effect, an acquittal of criminal liability in the whole transaction; while, if the conviction is for a less offense than that really committed, yet the state is certainly the delinquent party." The term, "constituent element," as a necessary ingredient, is therefore applied only to crimes consisting of two or more degrees, or where, by the necessary proof of one offense, another

charge is established. Thus it is that the rule allowing the prosecution to "carve as large an offense out of a single transaction as he can, yet he must cut only once," applies to different degrees or concomitant parts of the same offense, and not to different and distinct offenses, and it is clear that it can have no application to the case at bar. The judgment of the court below will therefore be affirmed.

AFFIRMED.

Decided 29 February, 1888.

SCHNEIDER v. LEE.*

[17 Pac. 269]

1. TITLE TO CHATTELS SOLD ON CONDITIONAL CONTRACT.—A sale and delivery of chattels on a contract reserving title in the vendor until the entire purchase price is paid, does not pass title to the vendee: *Singer Mfg. Co. v. Graham*, 8 Or. 17, and *Rosendorf v. Baker*, 8 Or. 240, followed.
2. GARNISHMENT—FRAUDULENT CONVEYANCE—COLLATERAL ATTACK.—One in possession of certain chattels made a general assignment for creditors, and his wife, claiming to be the owner of a half interest in such property, sued the assignee and prevailed, whereupon the chattels were sold and half the proceeds paid to her attorney by an order of court, after which a judgment creditor of the husband issued an execution and garnished the attorney. *Held*, that the question of the wife's title to the furniture could not be tried in a legal forum, she having been declared to be the legal owner by a judicial proceeding, the validity of which is not assailed; the remedy must be by a suit in equity.

From Multnomah: E. D. SHATTUCK, Judge.

Garnishment proceeding against Wm. M. Gregory, on an execution issued by H. Schneider against Lee & Marx. The garnishee had judgment, from which plaintiff appeals.

AFFIRMED.

NOTE.—This case has not been heretofore officially published, and is now reported with the sanction of the court.—REPORTER.

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38	477
83	578
43	381

Mr. Frank V. Drake for Schneider.

Mr. Chas. H. Woodward for Lee & Marx.

Mr. Wm. M. Gregory pro se.

MR. JUSTICE THAYER delivered the opinion.

The appellant herein undertook to reach certain moneys in the hands of the respondent Gregory, by means of an execution issued upon a judgment recovered in his favor and against the said Theodore Lee and F. Marx, which money ostensibly belonged to Nellie I. Lee, wife of said Theodore, and for whom said Gregory was acting as attorney. It appears that one J. M. Leonard formerly owned an undivided half of certain furniture, and that on the first day of August, 1883, he made a contract with said Theodore Lee, formally leasing the same to him. Said contract was in writing, and contained also a stipulation to the effect that, upon the payment of \$4,000—\$2,000 of it in hand, and the remaining \$2,000 in two payments of \$1,000 each, payable respectively in six and twelve months from that time, with interest—the property should belong to said Lee. It also appears that said Theodore Lee paid said \$2,000 in hand, and executed to said Leonard two negotiable interest-bearing promissory notes of \$1,000 each, payable in six and twelve months, respectively, and that thereupon said Leonard delivered to him said half interest in said furniture. Said F. Marx was at the same time the owner of the other half interest therein, and he and the said Lee were partners under the firm name of Lee & Marx, and used the said furniture in their partnership business. On the twenty-eighth day of July, 1884, the said Theodore Lee and Nellie I. Lee executed to one John Carson, the father of Nellie I. Lee, a chattel mortgage

upon the half interest in the furniture delivered to the said Theodore. On the twenty-ninth day of July, 1884, the appellant commenced the action against said Lee & Marx in which the said judgment was recovered, and upon the same day sued out a writ of attachment and had the same levied upon the said furniture. On the thirty-first day of July, 1884, and while the said property was in the hands of the sheriff under the said writ of attachment, the said Lee & Marx made a general assignment of their property under the insolvent laws of the state to one J. Haas, as assignee, which property consisted only of said furniture. In 1884, and prior to the maturity of the second promissory note executed by the said Theodore Lee to the said J. M. Leonard, which was due August 1, 1884, the said Leonard sold and endorsed the note to third parties. The said John Carson, on the thirty-first day of July, 1884, purchased this last note of the then holders, and said Leonard, also on that day, in consideration thereof, and \$150 paid by John Carson to Leonard on another account due him from Lee, at the request of said Lee and Carson, sold and assigned all of his (Leonard's) interest in the furniture and the notes and written contract before mentioned to said Nellie I. Lee.

The assignee, Jacob Haas, claimed that the title to said property had passed to Theodore Lee under the said written contract to him from Leonard, and was transferred to him, Haas, as such assignee, by virtue of the said assignment to him from Lee & Marx, whereupon the said Nellie I. Lee brought a suit in said circuit court to establish her title to the said property and to have partition thereof decreed. Such proceedings were had in the said suit that the said Nellie I. Lee recovered a decree therein for the relief claimed, which decree was affirmed, on appeal to this court. By stipulation of the

parties and order of the court, the whole of said property was sold and the proceeds thereof were paid into court to abide the result of said suit, and one-half of the same was directed by the decree in said suit to be paid to the said Nellie I. Lee. Said sale having been made and the said money paid into court, the clerk thereof paid to the respondent, Mr. Gregory, as attorney for Mrs. Lee, \$604.55, the one-half of such proceeds, in pursuance of the said decree; which is the money the appellant attempted to reach by means of his said execution in the hands of the said attorney Gregory.

1. From these facts several important questions arise that are presented for our consideration; the first one of which is the nature and effect of the transaction between Leonard and Theodore Lee, regarding the interest of the former in the furniture. The appellant's counsel contends that it operated as a complete transfer to Lee of Leonard's title to the furniture, notwithstanding the conditions expressed in the written contract; that the effect of the said conditions merely reserved in the former a right in the nature of a security for the payment of a debt. The transaction belongs to a class of contracts under which the rights of parties thereto, and their privies, have been frequently adjudicated upon by the courts, and different conclusions arrived at. It has been urged, with much reason, that where personal property is sold and delivered upon condition that the title shall remain in the vendor until the purchase price is fully paid by the vendee, a purchaser in good faith from the vendee, without notice of the terms of the contract of sale, will acquire the title to the property unaffected by the condition. This court, however, in *Singer Manufacturing Co. v. Gaham, et al.*, 8 Or. 17, and in *Rosendorf, et al., v. Baker*, 8 Or. 240, held that under such an agreement the title to the property did not pass to the vendee, and

that a sale of it by him to a *bona fide* purchaser conveyed no title; that the latter, at most, took only a right by implication to the use of the chattel until default in the stipulated payment. These decisions were in consonance with the later decisions of the courts of the State of New York; and yet it has been strongly insisted at the bar that the court should not adhere to that ruling. But, more recently, the Supreme Court of the United States, in *Harkness v. Russell*, 118 U. S. 663, has decided that, in the absence of fraud, an agreement for a conditional sale of personal property accompanied by delivery, was good and valid, as well against third persons as against the parties to the transaction. The facts in the latter case were somewhat analogous to those in the one under consideration, and the conclusion of the court, as mentioned, was reached after a review of a large number of authorities upon the question. In view of the decisions of this court in the cases referred to, and of the fact of their being sustained by such high authority as that of the Supreme Court of the United States, we would hardly be justified in making any different ruling, especially when we consider that it is a fundamental principle that a purchaser of a chattel only acquires the interest which his vendor had therein.

2. The next question presented is the effect of the assignment upon the rights of the appellant to resort to the property in order to satisfy his claim against Lee & Marx out of it. The appellant's counsel insists virtually that when a debtor has assigned his property for the benefit of his creditors, under the insolvent law of the state, any one of his creditors has the right to seize the property upon execution in satisfaction of his debt, if a third party interposes a fraudulent claim to it and obtains possession of it. It was in accordance with such alleged right that the attempt was made to levy the exe-

cution upon the money in the hands of Mr. Gregory. Whether such right exists or not the court does not deem it necessary to determine, as the court is satisfied that the question of Nellie I. Lee's claim to the furniture being fraudulent, especially under the circumstances of this case, cannot be tried in garnishee proceedings; that said property could only be reached by a suit on behalf of the appellant and the other creditors willing to join therein and contribute to the expense thereof,—a suit in the nature of a creditor's bill. The furniture had been adjudged, in a suit between parties representing the legal title, to belong to Nellie I. Lee. The adjudication was conclusive at law of her right to its custody, and the appellant had no apparent right to have it applied in satisfaction of his judgment. Nor could he establish such right without delving beneath the proceedings had, and showing that notwithstanding them an equity existed in his favor entitling him to have such application made. This he could not do under proceedings of garnishment, as they are legal and not equitable proceedings. The property, viewed from a legal standpoint, belonged to Nellie I. Lee. The court had already so adjudged in a suit which at least bound the legal title, and it was necessary for the appellant to go into an equitable tribunal in order to obtain a remedy, if he had any. He should have commenced a suit in which all persons interested in the matter could have been made parties and have had their rights therein determined.

The case was not like one where a debtor fraudulently disposes of his property in order to avoid the payment of his debts. There an execution may be levied upon the property in the hands of the vendee by garnishment, as provided in the Civil Code, for the debtor, as respects the creditor, still has the legal title. But here the legal title to the furniture, if in Theodore Lee, was transferred

to Haas, the assignee, and was divested out of him and invested in Nellie I. Lee by force of the decree in the partition suit.

Other questions are presented by the said facts, but it is unnecessary to consider them, as the view already expressed determines the case. The judgment appealed from must be affirmed.

AFFIRMED.

Argued 5 January; decided 27 February, 1899.

STATE v. RENICK.

[44 L. R. A. 266, 56 Pac. 275]

FALSE PRETENSES—FALSE TOKEN.—A person is not himself a false token so as to be indictable for obtaining money by means of a false token and false pretenses, under sections 1776 and 1872, Hill's Ann. Laws, where he procures money from a woman by a promise of marriage, and by offering himself to her under a fictitious name, and by falsely stating that he is unmarried.

From Multnomah: THOS. A. STEPHENS, Judge.

George Renick having been indicted for obtaining money by false pretenses demurred to the indictment. The demurrer was sustained, and the state appeals.

AFFIRMED.

For the state there was a brief over the names of *Chas. F. Lord*, former district attorney, and *Cicero M. Idleman*, attorney-general, with an oral argument by *Mr. Idleman* and *Mr. Russell E. Sewall*, district attorney.

For respondent there was a brief over the name of *Stott, Boise & Stout*, with an oral argument by *Mr. Geo. C. Stout*.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

The indictment in this case charges, in substance, that the defendant, George Renick, did on the tenth day of November, 1896, in Multnomah County, Oregon, willfully and feloniously, with intent to defraud, by means of a certain false token, to wit, himself, the said George Renick, falsely and fraudulently present himself, the said George Renick, and represent and pretend to one Carrie Meyer, an unmarried woman, that he, the said George Renick, was one Charles Smith, that he was unmarried, and competent and in a position to lawfully contract marriage with her, whereas, in truth and in fact, the said George Renick was not Charles Smith, and was not then unmarried, but had a lawful wife then living; by means of which false token, fraudulent pretense and false representations, coupled with a promise to marry her, the said Carrie Meyer, he, the said George Renick, did then and there obtain of Carrie Meyer divers gold coins, of the value of \$190. A demurrer to this indictment was sustained, and the state appeals. It is claimed that the money was obtained by false pretenses, through and by the use of a false token, and that the use by defendant of himself as such false token was sufficient in law to constitute the offense. This presents the only question to be determined.

There was a species of cheat or fraud at common law which was effectuated through the use of deceitful or illegal symbols or tokens, such as were calculated to affect the public at large, and against which common prudence could not have guarded. It was not sufficient upon which to found the offense if a mere privy token was employed,—a counterfeit letter in another person's name, or a private check upon a bank in which the drawer had no funds (*Lara's Case*, 2 Leach, 647, 652)

and the like,—not having the semblance of public authenticity or purporting to be of public consequence, such as spurious money of the realm or bank notes circulating throughout the community as a medium of exchange. But by St. 33 Hen. VIII, chapter I, the obtaining goods by means of false privy tokens, counterfeit letters, etc., is expressly made an indictable offense, and this, Mr. Bishop says, has now become common law with us: 1 Bishop, Cr. Law, § 571. But, as it regards privy tokens at least, this statute has always been considered as creating a new offense: *People v. Stone*, 9 Wend. 18. Another species of cheat or fraud at common law was accomplished through the false personation of another: 2 Russell, Crimes, 10, 11. Perhaps the commonly accepted definition of a “common law cheat” is that “it is a fraud wrought by some false symbol or token, of a nature against which common prudence cannot guard, to the injury of one in any pecuniary interest”: 1 Bishop, Cr. Law, § 571; 2 Wharton, Cr. Law, § 1116; 5 Am. & Eng. Enc. Law (2d ed.) 1025. But Russell, in his work on crimes, gives it a wider signification, and defines it as “the fraudulent obtaining the property of another by any deceitful and illegal practice or token (short of felony) which affects or may affect the public”: 2 Russell, Crimes, 613. See, also, 1 Bouvier Law Dict. p. 317. Under this definition, the cheat need not necessarily be accomplished through the use of a symbol or token, and cases are cited by the learned author, in connection with the definition, which would seem to support his enlarged conception of it. Some cases are cited by Bishop, as *Rex v. Jones*, 1 Leach, 174, wherein an apprentice got himself enlisted as a soldier, and thus obtained a bounty, by professing that there was no impediment; and *Rex v. Hanson*, Sayer, 229, wherein a woman was indicted for getting board

and lodging by falsely affirming herself to be single and of the name of Fuller, when she was married and of the name of Hanson. And it is supposed by the author that the boy in the one case and the woman in the other were tokens, and therefore that those cases were disposed of upon that ground only. But, when they are looked into, it does not appear that the decisions were based upon that theory. Indeed, they are so meagerly reported that it is difficult to determine what was the specific ground of their disposal. The broader definition of Russell and Bouvier of a "cheat" at common law would undoubtedly include the offense, as it was in either instance a deceitful practice. In the case of the boy, it was a willful misrepresentation touching his age and apprenticeship; and of the woman, a wrongful personation of another.

There is an old case of *Reg. v. Macarty*, 6 Mod. 301, wherein it was charged that Macarty, one of the defendants, falsely represented himself to be a broker, and Fordenborough, the other of such defendants, falsely pretended to be a merchant, of London, and as such traded in Portugal wines, and that, through such pretensions and representations, they induced one Chown to barter a quantity of hats for a quantity of a spurious and unwholesome wine, represented to be a good and wholesome Portugal wine. In deciding the case upon exceptions to the indictment, HOLT, C. J., says: "The crime is not the selling one thing for another, but here is a false token, the one pretending to be a broker and the other a merchant, and a combination to cheat." *Rex v. Govers*, Sayer, 206, is another old case wherein the defendant was indicted for falsely assuming to be a merchant, and producing divers counterfeit commissions purporting to be from Spain, and thereby induced another person to extend him credit. Upon a rule to show cause

why judgment should not be arrested, RYDER, C. J., said : "The present case is much stronger than than that of *Reg. v. Macarty*, inasmuch as the defendant, besides pretending to be a merchant, did produce several paper writings, which he affirmed to be letters containing commissions to him as merchant." Mr. Russell pertinently remarks of the first of these cases, that the true ground of the judgment was that it was a case of conspiracy, and this was another species of cheat at common law ; and of the second, that the cheat was effected by means of a forgery, which was in itself a substantive offense, indictable at common law. The forgery, if successful, was indictable as a common-law cheat. The broader definition alluded to would include these offenses also, without going to the extent of holding that the defendants themselves were tokens.

But, whatever may be the rule and definition touching the common-law cheat, the statutes of England early began to distinguish between the different species of cheat, and to carve out a distinct offense for obtaining money or property by falsely personating another. Such an offense has been widely adopted in the American states, and our own statute has made the act punishable : Hill's Ann. Laws, § 1776. The statute has also made it an offense for any person to obtain, or attempt to obtain, with intent to defraud, any money or property whatever, by any false pretense, or by any privy or false token : Hill's Ann. Laws, § 1777. The evidentiary matter necessary to support a charge under the latter section must consist of a false token or writing accompanying the pretense : Hill's Ann. Laws, § 1372. Construing the two sections together, the crime known to our statute is much the same as that constituted by 33 Hen. VIII, which extended the common-law cheat so as to include one accomplished through the use of a false privy token

or counterfeit letter. The two offenses are defined, however, and made separate and distinct, by statute, so that there need be no longer a question, as under the common law, as to whether, in the false personation of another, the person engaging in the deceit is himself a false token. It is made a crime to so act, and a case coming fairly within the statute, it is thought, could not be prosecuted under the section for obtaining money under false pretenses. The case at bar, however, is probably not a false personation, by reason of the fact that the defendant did not assume to represent a real personage, but only made use of a fictitious name, having no application to any one.

But it is contended that he is guilty of a false pretense by the use of himself as a token. If that were so, he must be regarded as a privy token, as his personation was not calculated, nor was it his purpose, to deceive or impose upon the public in general; the fraud being an imposition upon an individual only, and not extending to the injury of the public, in the sense of a public cheat. In the Jones Case, 1 Leach, 174, the personation was of a class capable of enlistment in the public service, and the act operated as a fraud in the procurement of public moneys. So, in *Rex v. Hanson*, Sayer, 229, the woman obtained general credit by pretending to be unmarried, thus affecting the public. Mr. Wharton puts a case: "If a pretender (e. g. Perkin Warbeck or the Tichborne claimant) palm himself off on a community as another person, and, under the guise of his assumed character, obtain credit from the public at large, he is indictable as a cheat, assuming that he imposes upon persons who have no notice that his claims are disputed, and also addresses his imposture to the public at large. The offense is aimed at the public generally, and is, supposing there is no notice to put the others on their guard, aimed as much at the

careful as the careless. Hence it is a cheat at common law." "But suppose," says the learned author, a little further on, "the pretender goes simply to an individual, and with that individual uses his pretended character as a basis for getting money, while there is nothing about the pretender's appearance or general reputation to sustain such character. In such case, there being no latency, since there is a direct subject tendered to the prosecutor on which to make inquiry, and the fraud being pointed at a single individual, it is not a cheat at common law": 2 Wharton, Cr. Law, § 1124. Thus is characterized the distinguishing feature between a token of public import and a privy token or symbol, and the effect of their use in the consummation of the common-law cheat, and it serves as an admirable aid in determining the nature of the supposed token used in the consummation of the offense charged. If, therefore, in the case at bar, the supposed token is a token at all, it should be termed a privy token.

But is the defendant himself even so much as a privy token? Within St. 33 Hen. VIII, such a token was taken to denote "a false mark or sign, forged object, counterfeit letter, key ring, etc., used to deceive persons, and thereby fraudulently get possession of property." Black, Law Dict. See, also, note to *Commonwealth v. Speer*, 2 Va. Cas. 67. Mere words are neither symbols nor tokens. Hence it has been held that one who obtains a credit by falsely representing himself to be in trade, and keeping a grocery, utters a mere falsehood. *Commonwealth v. Warren*, 6 Mass. 72. So, if one falsely pretends to another that he has been sent by a third person for money, and obtains it (*Reg. v. Grantham*, 11 Mod. 222); or, in selling a horse he knows to be blind, willfully represents him to be sound (*State v. Delyon*, 1 Bay, 353); or if he knowingly disposes of wrought gold under

the sterling alloy for gold of standard weight (*Rex v. Bower*, 1 Cowp. 323). In these and like cases the defendant but utters a naked falsehood, unconfirmed by symbol or token, and was not within St. 33 Hen. VIII. In the case of *Commonwealth v. Warren*, 6 Mass. 72, the defendant represented his name to be William Waterman, and that he lived in Salem; and the court said respecting it that, "if a man will give credit to the false affirmation of another, and thereby suffer himself to be cheated, he may pursue a civil remedy for the injury, but he cannot prosecute by indictment."

Now, were the representations which the defendant made to the prosecutrix more than wicked falsehoods, under our statute, or may it be affirmed that his presence when uttering the falsehoods was the exhibition of a false privy token, which induced her to part with her money and assisted him in consummating the fraud? It was a matter susceptible of proof and demonstration, upon inquiry, for she was not bound to take his word touching his assertions that he was an unmarried man or that his name was Smith. His physical presence had no tendency to establish the one fact or the other, and was, therefore, not an agent, in the sense of a token or a symbol, in consummating the deception and accomplishing the fraud. He may have been both a liar and the symbol of a liar, but he himself, considered as a token, did not contribute, by reason of his personal appearance, to the deception. By the statutes of England and many states of the Union the element of a false token or symbol is eliminated, and the law is broadly cast that whoever, by any false pretense, obtains money, etc., with intent to defraud, shall be guilty of the offense. The case of *Reg. v. Jennison*, 9 Cox, Cr. Cas. 158, is cited, wherein it appears that defendant was indicted for having obtained money from an unmarried

woman on the false representation that he was a single man, that he would furnish a house with the money, and would then marry her, and it was held that the false representation that he was not a married man was sufficient to support a conviction for false pretenses. But the authority is not in point, as the decision was made under the enlarged English statutes, and the question of a token did not enter into the controversy. Under our statute, the pretense must be accompanied with a false token, and the question presented here is whether defendant was himself a false privy token. We think he was not. He did not attempt to assimilate anything in existence. There are no personal or physical characteristics known to social science whereby an unmarried man may be distinguished from one that is married. So that if a man presents his physical self to another person, and says nothing of his marital state, no one can say whether he at that instant is married or single, from the inspection alone. Testimony must be produced *dehors* the person from which to determine the fact. If he says that his name is Charles Smith, a fictitious character, and that he was unmarried, when he had a wife living, this is a mere *descriptio personæ*, and an inspection of the person will neither corroborate nor detract from the statement. If he be denominated a "token," and that token is false, it is only made so by the lie he has uttered; his physical existence does not help to establish it. In other words, he has not assimilated anything of real existence whereby the unwary have been deceived. He did utter a wicked falsehood, and this is a false pretense, but the false token is wanting, and therefore the indictment does not charge a crime. It is necessary to specify the false token in the indictment (2 Wharton, Cr. Law, § 1129), and this the State

has not done. The judgment of the court below will therefore be affirmed.

AFFIRMED.

Decided 28 November, 1898.

GIBBONS v. MOODY.

[55 Pac. 23.]

APPEAL—PLACE OF FILING TRANSCRIPT—TERMS OF COURT.—Under Hill's Ann. Laws, § 2327, subd. 3, providing that the transcripts in all appeals from certain counties shall be filed at Pendleton unless otherwise stipulated, a transcript from one of such counties filed at Salem after the expiration of an intervening term at Pendleton, and not in consequence of a stipulation or order, is not filed at the proper time or place, and the appeal must be dismissed: *Judkins v. Tuffe*, 21 Or. 89, and *Connor v. Clark*, 30 Or. 332, applied.

From Wasco: W. L. BRADSHAW, Judge.

Proceedings by R. F. Gibbons and others against Z. F. Moody, executor, wherein the petitioners prevailed and the executor appeals. Petitioners move to dismiss the appeal.

Mr. Bela S. Huntington, for the motion.

No appearance *contra*.

DISMISSED.

PER CURIAM. This is a motion by Gibbons and others, respondents, to dismiss the appeal because the transcript of the cause was filed at Salem instead of Pendleton. The appeal is from Wasco County and was perfected March 16, 1898, The next succeeding term of this Court was held at Pendleton on the first Monday of May, and the transcript should have been filed there by the first day of the term, in the absence of a stipulation

to the contrary (Hill's Ann. Laws, § 2327, subd. 3), but, instead, it was filed at Salem on the fourth day of October, 1898. Upon this state of the record, the motion must be allowed and the appeal dismissed, on the authority of *Judkins v. Taffe*, 21 Or. 89 (27 Pac. 221), and *Connor v. Clark*, 30 Or. 382 (48 Pac. 364). It is so ordered.

DISMISSED.

Argued 23 January; decided 6 February 1899.

STATE v. WITT.

[55 Pac. 1053.]

TIME FOR OBJECTING TO GRAND JURY.—An objection that a grand jury or some members thereof were irregularly selected must be made before plea.

EFFECT OF IRREGULAR ORGANIZATION OF GRAND JURY.—The fact that a grand jury or one of its members is irregularly chosen, though under a valid law, does not render its proceedings void: *State v. Lawrence*, 12 Or. 297, distinguished.

From Marion : GEORGE H. BURNETT, Judge.

R. W. Witt was convicted of the offense of having in his possession, with intent to exhibit the same, an obscene writing, and he appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. M. E. Pogue*.

For the State there was a brief and an oral argument by *Messrs. D. R. N. Blackburn*, attorney-general, *Samuel L. Hayden*, district attorney, and *J. H. McNary*.

MR. JUSTICE BEAN delivered the opinion.

33	594
135	231
33	594
39	23

The defendant was indicted and convicted of the crime of having in his possession an obscene writing, with intent to exhibit the same. After being sentenced, his counsel moved the court to set aside and vacate the judgment, on the ground that the court was without jurisdiction to try the case, because the grand jury which found the indictment against him was not legally constituted. This motion was denied, and the defendant appeals.

The facts upon which the motion was based are that, after the grand jury for the term had been duly and regularly impaneled and sworn according to law, one of their number became ill, and was excused, and the court thereupon directed the clerk to draw by lot, from the jury box, another juror, to serve in his place, which was done accordingly, although at the time there were 12 jurors in attendance upon the court whose names were not in the jury box, they having been previously drawn and impaneled as jurors in a civil case then on trial. Thereafter, the indictment upon which the defendant was tried and convicted was returned. The contention for the defendant is that the grand jury, as thus constituted, was an illegal body, because the constitution provides (Const. article VII, § 18) that the grand jury shall be chosen by lot from the whole number of jurors in attendance at the court, and the argument is that the choosing of one member thereof contrary to the provisions of such section rendered the entire body illegal and its acts void.

The authorities upon the general subject as to how, when, and to what extent a defendant may question the regularity or validity of a grand jury which returns an indictment against him are in confusion, but they are generally agreed that when an indictment is returned by a body composed of the requisite number of qualified persons, chosen under a valid law, any objection as to

account of irregularity in the manner of the drawing or forming of the grand jury, if permissible to the defendant at all, must be made before plea to the merits. *Cooper v. State*, 120 Ind. 380 (22 N. E. 320); *State v. Collyer*, 17 Nev. 275 (30 Pac. 891); *Com. v. Parker*, 2 Pick. 550; *U. S. v. Gale*, 109 U. S. 65 (3 Sup. Ct. 1).

There is a distinction to be noted in the books between the acts of a body assuming to be a grand jury, but wholly unauthorized, or chosen by an illegal and unwarranted method, and one organized under a valid law, though its provisions are not strictly and accurately followed. In the former case it is held in some jurisdictions that the indictment and all subsequent proceedings thereunder are absolutely void, and the objection may be taken at any time, even on appeal: *Lott v. State*, 18 Tex. App. 627; *McNeese v. State*, 19 Tex. App. 48; *Harrell v. State*, 22 Tex. App. 692 (3 S. W. 479); *Finley v. State*, 61 Ala. 201; *Peck v. State*, 63 Ala. 201. But in the latter case the indictment is not void, and an objection to the regularity of the formation and organization of the grand jury cannot be taken after verdict and judgment. The case at hand comes within this rule. The statute (chapter V, title I, Cr. Code) under which the grand jury that indicted the defendant was formed and organized is admitted to be valid, and in conformity with the requirements of the constitution, and the only objection made is that the court did not strictly follow its terms and provisions. This did not render the grand jury an illegal body, or its proceedings void, and the objection to the regularity of its organization, if open to the defendant at all, should have been taken advantage of before plea. The case of *State v. Lawrence*, 12 Or. 297 (7 Pac. 116), is not in point, for two reasons: *First*, the grand jury which indicted Lawrence was chosen and organized under an unconstitu-

tional and void law ; and, *second*, the objection to the validity of the grand jury was made before plea. It follows from these views that the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Decided 20 April, 1896.

BOLES v. DELAY.

From Multnomah : E. D. SHATTUCK, Judge.

Action for the recovery of sundry chattels.
Freelove Delay appeals.

AFFIRMED.

Mr. Clarence Cole for appellant.

Mr. M. J. MacMahon for respondent.

The judgment of the court below was affirmed, the appeal having been abandoned. No opinion.

AFFIRMED.

SHOFNER v. PARKHURST.

From Multnomah : E. D. SHATTUCK, Judge.

Action by Annie C. Shofner against A. L. and Annie T. Parkhurst on a note. There was a verdict for plaintiff. Defendants appeal on the right of the court to add interest to the verdict.

DISMISSED.

Mr. Julius C. Moreland for appellants.

Messrs. J. F. Boothe and Wallis Nash for respondent.

The appeal was dismissed upon the stipulation of the parties. No opinion.

DISMISSED.

Decided 18 March, 1897.

KLAMATH COUNTY v. HOWE.

From Klamath: H. K. HANNA, Judge.

Action to recover on the official bond of W. E. Howe, as treasurer of Klamath County, resulting in a judgment for plaintiff.

DISMISSED.

Messrs. Lionel R. Webster and Hammond & Vawter for appellants.

Messrs. J. A. Jeffrey, district attorney, and *G. W. White* for respondents.

The appeal was dismissed on the stipulation of the parties. No opinion.

DISMISSED.

Decided 19 March, 1897.

CLATSOP MILL CO. v. CITY OF ASTORIA.

From Clatsop: THOS. A. McBRIDE, Judge.

Suit by the Clatsop Mill Co. against a vast and varied throng of contractors, laborers, material men, commissioners, municipal officers and others, to determine the priority of certain liens and the distribution of certain moneys, all arising out of the construction of the Astoria Water Works.

MODIFIED.

Messrs. B. M. Smith, J. Leighter, J. H. Smith, C. J. Schnabel, R. W. Wilbur and *La Force & Smith* for appellants.

Messrs. Noland & Thomson and *Fulton Bros.* for respondents.

The parties having agreed to a modification of the decree, a mandate was sent down accordingly. No opinion.

MODIFIED.

May 1898.]

JORY v. BOTTGGER.

599

Decided 28 February, 1898.

LANG v. DAY.

From Multnomah : HENRY E. MCGINN, Judge.

Action by Lang & Co., against J. G. & I. N. Day to recover the price of certain goods. Judgment for plaintiff, defendants appeal.

DISMISSED.

Messrs. Stott, Boise & Stout, and Gearin, Silvestone, Murphy & Brodie for appellants.

Messrs. Cox, Cotton, Teal & Minor, for respondent.

Pursuant to the written stipulation of the parties, the appeal was dismissed. No opinion.

DISMISSED.

Decided 28 April, 1898.

REED v. COMMERCIAL NATIONAL BANK.

From Multnomah : E. D. SHATTUCK, Judge.

Action by Walter J. Reed to recover the amount of a certain certificate, wherein plaintiff prevailed.

DISMISSED.

Messrs. Durham, Platt & Platt for appellant.

Mr. Allan R. Joy, for respondent.

The appeal was dismissed pursuant to the written stipulation of the parties. No opinion.

DISMISSED.

Decided 24 May, 1898.

JORY v. BOTTGGER.

From Marion : GEORGE H. BURNETT, Judge.

Suit by H. F. Jory against Talkington, Bottger & Co., to recover certain moneys paid to defendants as brokers to purchase wheat in the Chicago market, and which it

was claimed defendants did not so use. There was a trial before the court, who entered judgment for the plaintiff.

Messrs. Tilmon Ford and W. M. Kaiser for appellants.

Messrs. D'Arcy & Richardson for respondents.

Pursuant to the stipulation of the parties the cause was dismissed. No opinion.

DISMISSED.

Decided 28 July, 1898.

LANSING v. PLUMMER.

From Marion : GEORGE H. BURNETT, Judge.

Action by E. Y. Lansing against Plummer & Ault, principals, and H. Holden, surety, to recover on a builder's bond. There was a judgment for plaintiff, from which defendants appeal.

DISMISSED.

Messrs. Carson & Fleming and Tilmon Ford for appellants.

Messrs. George G. Bingham and Shaw, Hunt & McCulloch for respondent.

Pursuant to the written stipulation of the parties, the appeal was dismissed. No opinion.

DISMISSED.

Decided 17 October, 1898.

COMMERCIAL NATIONAL BANK v. CHAPMAN.

From Multnomah : LOYAL B. STEARNS, Judge.

Suit by the Commercial National Bank against W. S. Chapman and others to foreclose a mortgage. There was a decree for plaintiff, and defendants appealed.

AFFIRMED.

Messrs. Ward & Abraham, for appellants.

Messrs. Platt & Platt for respondent.

No transcript having been filed within the statutory time for so doing, the decree was affirmed, on motion of counsel for respondent. No opinion.

AFFIRMED.

Decided 7 November, 1898.

WHITE v DITTENHOEFER.

From Multnomah: LOYAL B. STEARNS, Judge.

Suit by Isam White against William Dittenhoefer and others to set aside certain conveyances of property as fraudulent. Decree for plaintiff.

AFFIRMED.

Mr. Martin L. Pipes, for appellants.

Messrs. Cox, Cotton, Teal & Minor for respondent.

Pursuant to stipulation, a decree was entered affirming the decree of the lower court, at cost of appellants. No opinion.

AFFIRMED.

Decided 7 November, 1898.

BLACK v. MALLEIS.

From Washington: THOMAS A. McBRIDE, Judge.

Action on a note of two hundred and sixty dollars,— judgment for plaintiff, and defendant appeals.

AFFIRMED.

Mr. Granville G. Ames for appellant,

Messrs. Hume & Hall, Fitzgerald & Schnabel and S. B. Huston for respondent.

No parties or attorneys appearing when the case was called for hearing, the judgment of the trial court was affirmed. No opinion.

AFFIRMED.

Decided 8 November, 1898.

STROWBRIDGE v. SPAULDING.

From Multnomah: E. D. SHATTUCK, Judge.

Action on a note, by J. A. Strowbridge against W. W. Spaulding, wherein plaintiff had judgment.

AFFIRMED.

Messrs. McDougall & Jones for appellant.

Messrs. Fenton, Bronaugh & Muir for respondent.

No transcript having been filed, and it appearing that the appeal had been abandoned, the judgment was affirmed. No opinion.

AFFIRMED.

INDEX

INDEX.

ABETTERS.

May be Indicted as Principals—Constitution. See CRIMINAL LAW, 13.

ABSTRACT OF RECORD.

Leave to File After Expiration of Time Allowed. See RULES OF COURT, 1.

ACCESSORY.

May be Indicted as a Principal. See CRIMINAL LAW, 13, 40.

ACCOMPLICES.

Indictment of—Constitutional Right. See CRIMINAL LAW, 13, 40.

ACCOUNTING.

Valuation of Property Taken Under Mortgage. See CHATTEL MORTGAGES.

ACTION.

CHARACTER OF ACTION FOR DEATH BY WRONGFUL ACT.

1. The right conferred by sections 369 and 371, Hill's Ann. Laws, permitting a personal representative to maintain an action for decedent's wrongful death, is an entirely new one conferred by the statute, and is based on the death of the injured person, not on the injury that caused it, so that the right of action exists though the decedent may have been instantly killed.—*Perham v. Portland Electric Co.*, 451.

WANT OF RELATIVES.

2. The fact that there are no surviving relatives or creditors of a person killed by a wrongful act or omission does not preclude a right of action by the personal representatives under Hill's Ann. Laws, §§ 369, 371, making the recovery assets of the estate.—*Perham v. Portland Electric Co.*, 451.

ACTS OF LEGISLATURE.

Constitutionality of Statutes. See CONSTITUTIONAL LAW, 3, 4, 5, 6, 7.

Construction of Statutes. Same as STATUTES.

ADEQUATE REMEDY AT LAW.

When this Defense is not Available. See ESTOPPEL, 1.

ADMINISTRATION.

Of Estates of Decedents. Same as EXECUTORS AND ADMINISTRATORS.

Of Estates of Insolvents. Same as INSOLVENTS.

ADVERSE POSSESSION.

EFFECT OF ADVERSE POSSESSION FOR STATUTORY TIME.

An adverse possession of public land, with a claim of exclusive title thereto as a homestead, for more than ten years, except as against the United States, vests a perfect title in the occupant, as against one who had obtained a patent before such occupancy.—*Fellows v. Evans*, 30.

ADVERSE TITLE.

Litigating Adverse Titles in Mortgage Foreclosures. See MORTGAGES, 2, 3.

AFFIDAVITS.

AMENDING RETURN—COMPETENCY OF IMPEACHING AFFIDAVITS.

In determining whether an officer should be allowed to amend his return of service it is proper to consider affidavits showing that it would be impossible to truthfully make a sufficient return.—*Fisk v. Hunt*, 524.

AFFIRMANCE.

For Failure to File Abstracts or Briefs. See RULES OF COURT.

AGE OF CONSENT.

Is Immaterial Under Common Law Charge of Rape. See CRIM. LAW, 17, 33.

AGENTS AND AGENCY.

POWER OF COUNTY AGENT TO RATIFY ILLEGAL CONTRACT.

1. Under the rule that no agent can ratify an act that he could not have done originally, the payment by county officials of warrants issued for what they know are illegal debts does not estop the county or its taxpayers from refusing payment of other similar warrants that are outstanding.—*Municipal Security Company v. Baker County*, 339.

2. The recognition of county warrants as part of the indebtedness of one county by a commission appointed to apportion such indebtedness between that county and another county will not estop the former county or its taxpayers to assert their invalidity on the ground that they were issued for an indebtedness voluntarily incurred beyond the limit allowed by the const., art. XI, sec. 10.—*Municipal Security Company v. Baker County*, 339.

RATIFICATION OF ACTS OF AGENT.

3. Plaintiff, by bringing an action for the balance due under a contract for the sale of certain chattels, and defendants, by accepting the chattels and paying part of the purchase price therefor, each with full knowledge of the transaction, ratified the contract, notwithstanding that their respective agents who executed it acted without authority.—*Mullaney v. Evans*, 330.

AIDER BY VERDICT.

Duplicity—Indictment—Surplusage After Verdict. See CRIM. LAW, 16, 17.

ALLEGATA ET PROBATA. See PLEADING, 3.

AMENDMENT

Of Pleadings—Practice Should be Liberal. See PLEADING, 3.

ANSWER.

Asking Equitable Relief Bars Defense of Remedy at Law. See PLEADING, 2.

APPEALABLE ORDERS. See APPEAL AND ERROR, 6, 8.

APPEAL AND ERROR.

APPEALS FROM PROBATE COURTS—PRACTICE.

1. An adjudication of a county court settling the final account of an administrator and directing the distribution of the estate, is a decree and not a judgment, and on an appeal the evidence must accompany the transcript and the case be tried anew.—*Re Plunkett's Estate*, 414.

2. On an appeal to the circuit court from a decree of a county court the cause is to be tried and the rights of the parties finally settled—it may be remitted for further proceedings as directed, but not for a new trial.—*Re Plunkett's Estate*, 414.

3. Where a record on appeal from a county court to the circuit court fails to show all the evidence given at the trial, or the jurisdictional papers, the circuit court cannot do otherwise than dismiss the appeal for lack of jurisdiction. The fact that the parties appear, and the cause is thereupon determined, does not cure the defect.—*Re Plunkett's Estate*, 414.

APPEAL FROM JUSTICE'S COURT—NEW UNDERTAKING.

4. Where an appellant filed with the justice of the peace in due time his undertaking on appeal sufficient in form, but by a mistake of the attorney one of the sureties did not appear and justify after being excepted to, and an application is made to the circuit court for leave to file a new undertaking, it should be granted and the case held for trial, under Hill's Ann. Laws, § 212.—*Gobbi v. Refrano*, 26.

ERROR MUST APPEAR IN THE RECORD.

5. Before the appellate court can undertake to correct an alleged error it must appear in the record that the error actually occurred.—*State v. Olberman*, 556.

APPEALABLE ORDER.

6. An intermediate order dissolving an attachment is not appealable.—*Farmers' Bank v. Key*, 443.

UNANSWERED QUESTION.

7. Alleged error in excluding an answer to a question is not available on appeal unless the bill of exceptions shows that counsel stated what he expected the answer to be.—*State v. Bartmess*, 110.

NEW TRIAL—DISCRETION OF COURT.

8. Motions to set aside verdicts and for new trials for insufficiency of the evidence are discretionary, and the orders thereon are not appealable.—*State v. Gardner*, 150.

APPEAL FROM PART OF JUDGMENT.

9. A law judgment not being severable, an appeal must be taken from the entire order, and the Supreme Court has power to make appropriate corrections in both the interlocutory and final proceedings.—*Farmer's Bank v. Key*, 443.

ORDER REMOVING ADMINISTRATOR.

10. An appeal from an order deposing an administrator does not suspend its operation; the removal is in force until reinstatement. Such is evidently the effect of Hill's Ann. Laws, §§ 1090, 1098 and 1100.—*Knight v. Hamaker*, 154.

MANDAMUS—APPEAL.

11. An appeal from a peremptory writ of mandamus requiring county commissioners to levy an additional tax will be dismissed, where it was not taken until after the commissioners had complied with the terms of the writ.—*Jacksonville School District v. Crowell*, 11.

WHEN BILL OF EXCEPTIONS IS NOT NECESSARY.

12. No bill of exceptions is necessary to present on appeal the propositions that the lower court was without jurisdiction and that the complaint does not state a cause of action. The judgment roll is sufficient.—*Reynolds v. Jackson County*, 422.

ASSIGNMENTS OF ERROR ON REPORTER'S NOTES.

13. Assignments of error cannot be based on the stenographic notes of the trial taken by the reporter unless they are properly preserved in a bill of exceptions.—*Reynolds v. Jackson County*, 422.

PLACE OF FILING TRANSCRIPT—TERMS OF COURT.

14. Under Hill's Ann. Laws, § 2327, subd. 3, providing that the transcripts in all appeals from certain counties shall be filed at Pendleton unless otherwise stipulated, a transcript from one of such counties filed at Salem after the expiration of an intervening term at Pendleton, and not in consequence of a stipulation or order, is not filed at the proper time or place, and the appeal must be dismissed: *Gibbons v. Moody*, 503.

SUFFICIENCY OF EXCEPTIONS.

15. An exception in gross to a series of instructions, some of which are correct, is unavailing on appeal.—*McAlister v. Long*, 368.

RULES OF COURT—FILING BRIEFS.

16. Appellant, having failed to file abstract or brief because the same questions were involved in another case pending on appeal, may, on the other case being dismissed, be relieved from failure to file them as required by the rules of court, and the case be heard on the briefs in the other case and such others as either party may file.—*Garnsey v. County Court*, 201.

17. Where there has been notable delay in filing briefs beyond the time limited by the rules, and no satisfactory explanation thereof is given, the case will be dismissed.—*Blank v. Walker*, 372; *Reynolds v. Jackson County*, 422.

WHO MAY NOT APPEAL.

18. A plaintiff whose complaint would not support a judgment for him, and the defect in which has not been waived or cured by other pleadings or by verdict, cannot complain of errors at the trial.—*Kimball v. Redfield*, 292.

19. After an administrator has been removed he no longer has authority to represent the estate, and an appeal taken by him while in office will be dismissed unless his successor desires to continue it.—*Knight v. Hamaker*, 154.

INCONSISTENT INSTRUCTIONS.

20. Appellant cannot complain of the inconsistency of different instructions where the inconsistency resulted from the giving of instructions proffered by him which were not germane to the issue.—*Mullaney v. Evans*, 331.

APPEAL AND ERROR—CONTINUED.

21. A defendant cannot complain that charges are contradictory when he asked for them.—*State v. Branton*, 533.

SPECIAL CHARGES.

22. It is not error to refuse requests for special charges, the substance of which was given in the general charge.—*State v. Branton*, 533.

INSTRUCTIONS MUST BE TAKEN TOGETHER—TRIAL.

23. A judgment will not be reversed because some instruction considered alone may be subject to criticism where the instructions as a whole are substantially correct and could not have prejudicially misled the jury.—*State v. Bartmess*, 110.

REVIEWING QUESTIONS OF FACT.

24. Questions of fact decided in the trial court cannot be reviewed in the Supreme Court.—*Hutchcroft v. Herren*, 1.

25. A verdict will not be disturbed on appeal if supported by the evidence merely because the Appellate Court takes a different view of the evidence than the jury took.—*First National Bank v. Fire Association*, 173.

HARMLESS ERROR.

26. Error in admitting incompetent evidence as to the value of articles injured or destroyed by fire set by defendant's negligence cannot be regarded as harmless because competent evidence was subsequently given as to the value of some of such articles, where the verdict is for a gross sum. In such a case there is no means of telling whether the competent or incompetent evidence decided the jury.—*Townley v. Oregon Railroad Company*, 324.

27. The admission of the testimony of a party that she did not sign a contract in writing, though not material, is not reversible error, where the contract itself is introduced in evidence and discloses on its face that she did not sign the same.—*Mullaney v. Evans*, 331.

28. Evidence tending to disprove the claim of the party offering it is harmless, even though inadmissible.—*Mullaney v. Evans*, 331.

29. In an action for negligently causing death, a refusal to charge that exemplary damages cannot be recovered is harmless where none were asked.—*Perham v. Portland Electric Company*, 451.

30. Where witness testified that he thought he recognized a person whom he had seen, error in permitting him to name such person was cured by his subsequent positive statement that he recognized the person.—*State v. Welch*, 33.

31. Error, if any, in refusing to permit a witness to be examined concerning his hostility towards accused's relatives was cured where his subsequent cross-examination disclosed his condition of mind towards such persons.—*State v. Welch*, 33.

MISCONDUCT OF JURY.

32. The fact that jurors drink intoxicating liquors during the trial will not invalidate a conviction even in a capital case, unless it appears that such drinking probably affected their verdict.—*State v. Olberman*, 556.

33. The mere fact that the direction of the court that the jury be kept together during the progress of the trial has been violated is not cause for reversal, if it appears that their verdict was not improperly influenced.—*State v. Olberman*, 556.

SUFFICIENCY OF NOTICE OF APPEAL.

34. A notice of appeal which describes the judgment appealed from no further than that it was entered against appellant in an action between certain parties in a certain court on a certain day is not sufficient.—*Hamilton v. Butler*, 370.

SUFFICIENCY OF MOTION TO DISMISS APPEAL.

35. A party asking the dismissal of an appeal by reason of a technical defect in the proof of service of the notice must specify definitely and with certainty the point of the irregularity complained of.—*Herrmann v. Hutcheson*, 239.

CERTIFICATE OF SERVICE OF MOTION.

36. A constable's return of the service of a notice of appeal is insufficient where it specifies that the service was made within a certain county and state, but fails to show that it was made within the constable's own precinct.—*Herrmann v. Hutcheson*, 239.

NONSUIT.

37. The supreme court will not review a refusal to direct a verdict or a nonsuit unless the bill of exceptions affirmatively shows that it contains all the evidence given at the trial by the party carrying the burden of proof.—*First National Bank v. Fire Association*, 123.

BILL OF EXCEPTIONS—PART OF EVIDENCE—PRESUMPTION.

38. When the bill of exceptions does not contain all the testimony it will be presumed that the verdict was supported by the evidence, and that it is according to law.—*State v. Gardner*, 149.

FINDINGS OF FACT.

39. It is the imperative duty of a law court *sua sponte*, when hearing a cause without a jury, to make findings of fact on all the material issues presented by the pleadings, and if this has not been done the case will be reversed.—*Breding v. Williams*, 391.

PLEADING.

40. Since an objection to a complaint because it does not state a cause of action is never waived, it is immaterial whether a court erred or was correct in overruling a motion for judgment *non obstante* after disposing of a demurrer which raised the same point.—*Hargett v. Beardstey*, 301.

ACCEPTING BENEFIT OF DECREE AS A WAIVER OF RIGHT TO APPEAL.

41. Pending the hearing of a case on its merits the appellate court will not make an order allowing appellant, without prejudice to his right of appeal, to draw from the clerk of the trial court the money that respondent had deposited there under the decree appealed from, where the acceptance of the money without such an order would have been a waiver of the right to appeal.—*Stemmer v. Scottish Insurance Company*, 66.

REMANDING CAUSE.—LEAVE TO ANSWER.

42. Upon the remandment of a cause by the appellate court for further proceedings in the court below it is for the latter to determine in the first instance whether a party shall be given leave to plead over.—*Lieuallen v. Mosgrove*, 283.

APPEARANCE.

WAIVER OF SERVICE OF PROCESS BY GENERAL APPEARANCE.

One who contested upon the merits a proceeding to locate a public road cannot thereafter complain that there was no sufficient service of a copy of the order appointing viewers.—*Towns v. Klamath County*, 228.

APPENDIX to Oregon Code.

Use of Forms Provided Therein. See *State v. Lee*, 509.

APPROPRIATION of Water.

Vested Rights of Prior Appropriators in Western States. See *WATERS*, 1, 3.

ARBITRATION AND AWARD.

WAIVER OF OBJECTION TO ARBITRATOR.

1. Where a party to an arbitration knows at the time the other party selects its arbitrator that he is a nonresident, a failure to object will be deemed a waiver of that objection.—*Stemmer v. Scottish Insurance Company*, 65.

EXPERIENCE OF ARBITRATOR NO OBJECTION.

2. The prior service of an arbitrator in a similar capacity does not render him incompetent, or invalidate an award in which he joined, in the absence of evidence showing that he was prejudiced.—*Stemmer v. Scottish Insurance Company*, 65.

CONCLUSIVENESS OF AWARD.

2. The determination by appraisers appointed by the parties is final and conclusive in the absence of fraud or misconduct on their part, the rule being that an award deliberately and honestly made will not be set aside merely for an excess.—*Stemmer v. Scottish Insurance Company*, 65.

INADEQUACY OF AWARD.

4. Where there is competent evidence to show that the loss sustained by the insured upon a portion of his property is only about one-third the amount claimed, an award of arbitrators which cuts his entire loss down in about the same proportion will not be set aside on the ground of inadequacy.—*Stemmer v. Scottish Insurance Company*, 65.

ARBITRATION AND AWARD—CONCLUDED.

REJECTION OF TESTIMONY BY ARBITRATORS.

5. While it is a general rule that if appraisers exclude material testimony it will be fatal to the award, it is also true that testimony must be offered before it can be rejected; so that, where the insured only announced that he was willing to produce witnesses on a certain point, without actually offering them, it cannot be said that the arbitrators rejected pertinent testimony.—*Stemmer v. Scottish Insurance Company*, 65.

SECRECY OF DELIBERATIONS.

6. Arbitrators chosen to fix the amount of a fire loss need not reveal their estimate of loss upon the various articles as they fix upon the same, but may defer the giving of such information until the award is made.—*Stemmer v. Scottish Insurance Company*, 65.

MISTAKE OF LAW.

7. An honest error by arbitrators in applying the rules of evidence does not constitute a valid reason for setting aside the award.—*Stemmer v. Scottish Insurance Company*, 66.

INTEREST ON THE AWARD.

8. Where an insured sues to set aside an award, he should not be allowed interest until the decree is entered, for, having rejected the award, there was nothing on which to compute interest.—*Stemmer v. Scottish Insurance Company*, 66.

ASSESSMENT OF TAXES.

Board of Equalization—Correction of County Assessments. See TAX., 1, 2.

Power of Courts to Correct Irregular Assessments. See TAXATION, 5.

Harmless Error in Classification. See TAXATION, 4.

Power of County Court to Change an Assessment. See TAXATION, 7.

ASSIGNMENT FOR CREDITORS.

INSOLVENTS—COMPENSATION OF ASSIGNEE.

An assignee for creditors is entitled to a reasonable compensation, considering the time and talent required and the character of the service performed, and the amount is to be determined by the court, under section 3180, Hill's Ann. Laws, which authorizes the allowance to an assignee of such commissions as may be considered just.—*Re Assignment of Woodall*, 382.

ASSIGNMENTS OF ERROR.

Cannot be Predicated on Reporter's Notes Alone. See APPEAL, 13.

ATTACHMENT AND GARNISHMENT.

LIABILITY OF GARNISHEE.

1. A purchaser of property under a contract with the owner's agent is not protected against the claim of the owner for the purchase price by payment to a creditor of the agent under a garnishment judgment, where he knew of the plaintiff's ownership of the property and claim to the purchase price in time to have so stated in the answer to the garnishment, but did not do so.—*Mullaney v. Evans*, 331.

ORDER DISSOLVING ATTACHMENT—APPEAL.

2. An order dissolving an attachment is not a final order in the sense that it may be appealed from.—*Farmer's Bank v. Key*, 443.

FRAUDULENT CONVEYANCE—COLLATERAL ATTACK.

3. One in possession of certain chattels made a general assignment for creditors, and his wife, claiming to be the owner of a half interest in such property, sued the assignee and prevailed, whereupon the chattels were sold and half the proceeds paid to her attorney by an order of court, after which a judgment creditor of the husband issued an execution and garnished the attorney. Held, that the question of the wife's title to the chattels could not be tried in a legal forum, she having been declared to be the legal owner by a judicial proceeding, the validity of which is not assailed; the remedy must be by a suit in equity.—*Schneider v. Lee*, 578.

AUSTRALIAN BALLOT LAW.

Duty of Secretary of State—Certificates to County Clerks. See OFFICERS, 2.

BANKS AND BANKING.

NOTICE TO CASHIER.

Notice to the cashier of a bank is notice to the bank, in transactions conducted by him for it within the scope of his authority, regardless of his *bona fides* in conducting such transactions, where the bank adopts his acts.—*Farmer's Bank v. Saling*, 395.

BIAS.

Disqualification of Jurors—Fixed Opinion. See TRIAL, 23.

Feeling of Witness may be Shown. See TRIAL, 14.

BILLS OF EXCEPTIONS.

Sufficiency of—Reviewing Motion for Nonsuit. See APPEAL, 37.

Not Necessary to Present Certain Questions. See APPEAL, 12.

Errors Must Form Part of the Bill of Exceptions. See APPEAL, 13.

BILLS AND NOTES.

SUFFICIENCY OF DEMAND OF PAYMENT.

Presentment and demand of payment made on a receiver *pendente lite* of an insolvent bank and notice of nonpayment by him are insufficient to bind an indorser of a negotiable certificate of deposit issued by the bank before its insolvency.—*Jackson v. McIntire*, 529.

BOARD OF EQUALIZATION.

JURISDICTION OF STATE BOARD OF EQUALIZATION—RECORD.

1. The jurisdiction of the state board of equalization, established by laws 1891 (p. 182), pertains only to the equalization of the assessment of property to secure uniformity in valuations between the different counties of the state, and its functions are exercised in a summary manner. There are no parties to its proceedings, nor does it act *in rem*, and a record is not essential to the establishment of jurisdiction of person or thing. So far as county rolls are concerned, the only record provided for is a tabulated statement of the abstracts of the county rolls, prepared by the secretary of the board. It is not necessary that the rolls themselves be before the board or even on file in the office of the secretary of state.—*Dayton v. Board of Equalization*, 131.

CHARACTER OF STATE BOARD.

2. The state board of equalization has revisory but not appellate powers: it is merely part of the machinery for equalizing taxes between the various counties.—*Dayton v. Board of Equalization*, 131.

ABSENCE OF COUNTY ROLLS.

3. It was merely a harmless irregularity that the board of equalization did not have before it the certified copy of the assessment roll of one county, where the record of the board shows that it acted upon an abstract of such county's roll, and that it actually equalized the assessments of such county, together with all the other counties.—*Dayton v. Board of Equalization*, 131.

IRREGULAR CLASSIFICATION—HARMLESS ERROR.

4. Although the statute (Hill's Ann. Laws, §§ 2770 and 2776) divides real property into only two classes for the purposes of taxation, viz., platted and rural land, it is not a fatal irregularity in the county assessment rolls if the former class is subdivided into "lots" and "improvements on lots." The state equalization board may properly add the two sets of values, making thereby a single class of the kind indicated by the statute, and then equalize it.—*Dayton v. Board of Equalization*, 131.

POWER OF STATE BOARD TO CORRECT COUNTY ASSESSMENTS.

5. The state board of equalization has no power to correct errors of county assessors or county boards of equalization: its functions are exercised entirely in adjusting the relative rights of counties.—*Dayton v. Board of Equalization*, 131.

POWER OF COURTS TO CORRECT ASSESSMENTS—WRIT OF REVIEW.

6. The courts cannot, upon a writ of review from the action of the state board of equalization, correct errors and irregularities of the assessors or county boards in making up their assessment rolls.—*Dayton v. Board of Equalization*, 132.

BOARD OF EQUALIZATION—CONCLUDED.

EQUALITY OF TAXATION REQUIRES UNIFORMITY OF CLASSIFICATION.

7. To enable the state board of equalization to secure proportional or uniform values among all the counties in the state, as contemplated by the Oregon statutes, there must be uniformity of classification; and the board has no authority to increase the assessment upon a particular class of personal property in one county where the assessment roll of another county does not recognize such particular class.—*Dayton v. Board of Equalization*, 182.

BOND FOR DEED.

Foreclosure of is Without Sale or Redemption. See EQUITY, 4.

BOUNDARIES.

The meander line run by a surveyor on the ground inside of the bank of a stream should be taken as the boundary of the lots surveyed where there is a wide and material divergence between such meander line and the bank.—*Barnhart v. Ehrhart*, 214.

BRIDGES.

Expense of Building and Repairing Bridges is Voluntary. See COUNTIES, 9.

BRIEFS

Dismissing Appeal for Failure to File. See RULES OF COURT.

BUILDING.

PERSONAL PROPERTY.

It is error to nonsuit plaintiff in an action for conversion of a building upon the ground that his evidence shows the building to be real and not personal property, where the defendant claims the building by virtue of a levy upon it as personal property under attachment, and the evidence merely shows that it was erected by one person upon land of another under an agreement giving the former the right to remove it.—*Wheeler v. McFerron*, 22.

CARNAL KNOWLEDGE.

By Boy Under Sixteen Years of Age With Any Female. See CRIM. LAW, 33.

CASES FROM THE OREGON REPORTS Applied, Approved, Cited, Distinguished, Followed and Overruled in this Volume. See OREGON CASES.

CASHIER.

When Notice to Cashier is Notice to his Bank. See BANKS.

CERTIFICATE.

Of Service of Writ Must Show Venue. See SHERIFFS.

Of Service of Process is Only Prima Facie Correct. See SHERIFFS.

Of Secretary of State Under Australian Ballot Law. See OFFICERS, 2.

CHARGING JURY.

Requests for Special Charges—Refusal. See TRIAL, 7.

Charge Must be Considered as a Whole. See TRIAL, 4.

CHARTERS OF CITIES.

Portland, Charter of.—*Ex parte McGee*, 165.

CHATTEL MORTGAGES.

ACCOUNTING FOR MORTGAGED PROPERTY.

A chattel mortgagee whose mortgage authorizes him to take possession of the mortgaged property at any time he deems himself insecure who takes possession of the same before the maturity of the note secured by the mortgage, must account therefor at the value of such property when he takes possession.—*Lomax v. Walk*, 385.

CHATTELS.

Effect of Reserving Title Until Price is Paid. See SALES.

Building May be Real or Chattel Property. See BUILDING.

CIRCUIT COURTS.

Proceedings on Appeal From Order Distributing Estate. See COURTS.

CITIES. Same as MUNICIPAL CORPORATIONS.

CLAIM AND DELIVERY. Same as REPLEVIN.

CO-CONSPIRATORS.

Indictment of as Principals—Constitutional Right. See CRIMINAL LAW, 13.
Declarations of as Evidence Against Absentee. See CRIMINAL LAW, 39.

CODE CITATIONS. Same as STATUTES OF OREGON.

COLLATERAL ATTACK.

On Jurisdiction of County Court in Opening Road. See HIGHWAYS, 8.
On Fraudulent Sale in Probate Proceeding. See JUDGMENTS, 4.
Adjudicated Title is Conclusive Against Garnishment. See ATTACH., 3.

COMMON LAW.

Appeal From Adjudication of Former Acquittal. See CRIMINAL LAW, 35.

COMPENSATION.

Of Assignee for Creditors is Discretionary. See ASSIGNMENT FOR CREDITORS.

COMPETENCY.

Of Expert and Opinion Evidence Discussed. See EVIDENCE, 1, 9.
Of Evidence on Admitted Facts to Show Motive. See EVIDENCE, 11.

COMPOUNDING CRIME.

Subsequent Arrest of the Criminal as a Defense. See CRIMINAL LAW, 2.
Order of a Superior is not a Defense. See CRIMINAL LAW, 3.

CONDITIONAL SALES.

Effect of Reserving Title—Rights of Purchaser. See SALES.

CONSPIRATOR.

Indictment of—Nature and Cause of Accusation. See CRIMINAL LAW, 13.
Declarations of as Evidence Against Absentee. See CRIMINAL LAW, 39.

CONSTABLES.

Return of Service Must Show Precinct Where Made. See SHERIFFS, 1.

CONSTITUTION OF OREGON.

Article I.	{	Sec. 11 {	<i>State v. Hinkle</i> , 97.
			<i>State v. Branton</i> , 533.
		Sec. 12 {	<i>State v. Bartness</i> , 121.
		Sec. 13 {	<i>Towns v. Klamath County</i> , 225.
Article IX.	{	Sec. 32 {	<i>Sullivan v. Cline</i> , 261.
			<i>Dayton v. Board of Equalization</i> , 148.
Article XI.	{	Sec. 1 {	<i>Dayton v. Board of Equalization</i> , 148.
		Sec. 10 {	<i>Municipal Security Company v. Baker County</i> , 338, 339.

CONSTITUTION OF UNITED STATES.

Article XIX. Sec. 1 { *Towns v. Klamath County*, 225. U. S. CONSTITUTION.
Sullivan v. Cline, 261.

CONSTITUTIONAL LAW.

COUNTY INDEBTEDNESS PROHIBITED BY CONSTITUTION.

1. The prohibition against counties contracting indebtedness above a specified amount, under Art. XI, § 10 of the constitution, applies only to such debts and liabilities as they may voluntarily incur or create, and not to those that are thrust upon them by operation of law and which they are powerless to prevent. —*Municipal Security Company v. Baker County*, 338.

CONSTITUTIONAL LAW—CONCLUDED.

COUNTIES—RULE FOR APPLYING LAW AGAINST DEBTS.

2. The taxpayers should have the benefit of the doubt and be protected by the constitutional prohibition against voluntary indebtedness, where it is not entirely certain that the obligation had to be incurred—in other words, there should be a clear warrant of law for every county expenditure, or it will be a voluntary indebtedness.—*Municipal Security Company v. Baker County*, 338.

ROAD CONDEMNATION PROCEEDINGS.—PUBLIC USE.

3. In considering statutes providing for taking private property for roads, the test of constitutionality is the use to which the road will be subject—if it is open for the public to use, the statute is valid, but it is otherwise if it is for the exclusive use of the petitioner.—*Towns v. Klamath County*, 226.

4. Sections 4075-4079, Hill's Ann. Laws, providing for locating a county road from residences not reached by a convenient road to some other public road, are not unconstitutional as condemning private property for private use, since the road when open will be at the disposal of the entire public.—*Sullivan v. Cline*, 260.

ESTABLISHING HIGHWAYS—NOTICE.

5. The constitutional rights of a non-consenting landowner are not infringed because he had no prior notice of an intended application for the laying out of a public road, but it is sufficient if he has subsequent notice and is afforded an opportunity at some stage of the proceedings to be heard on the question of compensation for his land sought to be taken.—*Towns v. Klamath County*, 226.

6. Sections 4075-4079, Hill's Ann. Laws, providing for the establishment of roads of public easement to private residences by condemning private property therefor, are not invalid because they made no provision for notice to a non-consenting landlord of the intended application for a road, since at a subsequent stage of the proceedings he may appeal from the award of damages to a court of general jurisdiction.—*Sullivan v. Cline*, 260.

CONSTITUTIONAL RIGHT OF ACCUSED—INDICTMENT.

7. The guaranty to an accused person by the Oregon constitution, article I, § 11, of the right to demand the nature and cause of the accusation against him is not infringed by charging an accessory before a crime as though he had directly committed the criminal act.—*State v. Branton*, 533.

CONSTRUCTIVE TRUSTS.

Trusts Ex Maleficio—Statute of Frauds. See TRUSTS.

CONTRACTS.

ASSUMING PAYMENT OF MORTGAGE.

1. One who accepts a conveyance of lands in which it is provided that the grantee shall assume the payment of a lien on such land makes the debt his own as though he had originally executed it.—*Farmer's National Bank v. Gates*, 338.

RATIFICATION BY PART PAYMENT.

2. A contract irregularly made by part of a set of school directors is ratified so as to be binding upon the school district by the payment of the salary for part of the term with the approval and acquiescence of the board.—*Graham v. School District*, 263.

MUNICIPAL CORPORATIONS—CONSTRUCTION OF CONTRACT.

3. Under an ordinance providing that a paving contractor shall give a bond to the city in an amount equal to the contract price of the improvement, conditioned that he shall perform the contract according to specifications, and also give a bond equal to 25 per cent. of the contract price, conditioned that for the period of five years from the date of its completion he will keep the pavement in repair by immediately, upon proper notice, repairing at his own cost and expense any injuries or worn-out places or other defects due to traffic, or on account of disintegration or decay, or in any manner attributable to defective materials or workmanship, a bond given by a contractor under the latter part of the ordinance is an undertaking to maintain the pavement in repair for a designated period of time, and not a guaranty that the work will be done and the materials furnished according to the contract.—*Portland v. Bituminous Paving Co.*, 307.

CONTRACTS—CONCLUDED.

CONSTRUCTION OF CONTRACT—LEASE.

4. A contract by which one person is to rent certain premises, advance and pay the rent therefor, furnish necessary grain to seed the same, advance the money for harvesting the crops and the sacks for the same, and a second person is to cultivate the land and care for the crop produced until ready for harvesting, furnish the necessary assistance in harvesting, and out of the proceeds arising therefrom repay the former all money advanced for harvesting, sacking and marketing the crop and for rent of the premises, and also a debt due from him to such former person, entitles the husbandman to any surplus remaining after making such payments, although the contract is silent in regard thereto. Considered in its entirety, the contract is one of leasing.—*Hargrett v. Beardley*, 301.

STATUTE OF FRAUDS.

5. A memorandum signed by two parties reciting an agreement by the party of the first part to deliver certain pasture land to the party of the second part, and an agreement by the latter that the party of the first part can have the use of a certain other pasture, is not invalid on the ground that it is merely an unaccepted offer by the party of the first part. By signing it, both parties became bound by its terms to give and take as therein provided.—*Stubblefield v. Imbler*, 446.

CONVEYANCE.

Meaning of "Point"—Courses—Construction of Deed—Rejecting Part of Description. See DEEDS.

CORPORATIONS. See MUNICIPAL CORPORATIONS.

COSTS.

TENDER IN FORECLOSURE CASE.

1. A failure of a vendor to make a tender of performance before instituting suit to foreclose the equitable interest of the vendee under a bond can only affect the question of costs; and, if such failure is not made a defense, the costs should abide the result.—*Security Savings Company v. Mackenzie*, 200.

WITNESS' FEES AND MILEAGE.

2. A party who is entitled to his costs may recover as disbursements the mileage and per diem of a material witness, residing in the state, who attended the trial at his request, but without having been served with a subpoena.—*Perham v. Portland Electric Company*, 451.

COTENANCY in Crops. See LANDLORD AND TENANT.

COUNTERCLAIM.

A counterclaim for unliquidated damages in an action on a note does not cut off the running of interest on the note from the time such counterclaim accrued, but only from the verdict, except where the damages are previously liquidated by the confession or default of plaintiff.—*Smith v. Turner*, 379.

COUNTIES AND COUNTY INDEBTEDNESS. See also COURTS, 1, 2, 8, 9, 11.

PROHIBITED COUNTY INDEBTEDNESS—CONSTRUCTION OF CONSTITUTION.

1. The prohibition against counties contracting indebtedness above a specified amount, under Art. XI, § 10 of the constitution, applies only to such debts and liabilities as they may voluntarily incur or create, and not to those that are thrust upon them by operation of law and which they are powerless to prevent.—*Municipal Security Company v. Baker County*, 338.

RULE FOR APPLYING LAW AGAINST DEBTS.

2. The taxpayers should have the benefit of the doubt and be protected by the constitutional prohibition against voluntary indebtedness, where it is not entirely certain that the obligation had to be incurred—in other words there should be a clear warrant of law for every county expenditure, or it will be a voluntary indebtedness.—*Municipal Security Company v. Baker County*, 338.

VOLUNTARY DEBT—SHELIVING FOR VAULT—INSURANCE.

3. A county is not by law obligated to provide sheliving or boxing for the vaults where its records are kept, nor is it compelled to insure its property; and indebtedness incurred for either of these purposes is entirely voluntary.—*Municipal Security Company v. Baker County*, 338.

COUNTIES AND COUNTY INDEBTEDNESS—CONCLUDED.

EXPENSES OF COUNTY BUILDINGS.

4. Under Hill's Ann. Laws, § 896, subd. 1, the expense of erecting or repairing necessary county buildings is not an obligation imposed on the county by operation of law.—*Municipal Security Company v. Baker County*, 339.

PURCHASE OF TOLL ROADS—PAYMENT OF SCALP BOUNTIES.

5. It is not necessary to the performance of its corporate functions that a county shall buy toll roads or pay a bounty for scalps, and any indebtedness incurred for such purposes is purely voluntary.—*Municipal Security Company v. Baker County*, 339.

PURCHASE OF POOR FARM IS VOLUNTARY.

6. County warrants representing the purchase of a poor farm are within the prohibition of the Const., Art. XI, § 10, against counties voluntarily creating indebtedness beyond a specified amount.—*Municipal Security Company v. Baker County*, 339.

EXPENSES OF RE-INDEXING AND REPLATTING RECORDS.

7. Under a statute that a certain officer should receive for certain work "such compensation as the county judge and county commissioner may deem sufficient" it is discretionary with the officials to order such work done or leave it undone, and the expense, if it is done, is wholly voluntary, under the inhibition of the Constitution, Article XI, § 10.—*Municipal Security Company v. Baker County*, 339.

EXPERT EXAMINATION OF BOOKS OF PUBLIC OFFICERS.

8. Warrants issued for posting up public records that are behind and for experting books of the county officers are necessary expenses of conducting a county imposed by law.—*Municipal Security Company v. Baker County*, 339.

BRIDGES.

9. An indebtedness incurred by a county in constructing or repairing bridges is a voluntary obligation, within the prohibition against county indebtedness contained in the constitution, Art. XI, § 10, for Hill's Ann. Laws, § 4140 distinctly provides that county courts "may * * * in their discretion" expend public funds for bridges.—*Municipal Security Company v. Baker County*, 339.

WARRANTS FOR MORE THAN THE INDEBTEDNESS.

10. County warrants are void where a percentage is added to the amount due in order to bring the warrants to a cash basis in the market.—*Municipal Security Company v. Baker County*, 339.

APPROPRIATION OF CURRENT REVENUES TO VOLUNTARY INDEBTEDNESS.

11. Unappropriated current revenues of a county, including those which are past due and uncollected, cannot be anticipated by voluntary indebtedness of the county, especially where the county is otherwise largely indebted for ordinary current expenses.—*Municipal Security Company v. Baker County*, 339.

PAYMENT OF UNLAWFUL INDEBTEDNESS NOT AN ESTOPPEL—AGENCY.

12. The payment by the county authorities of warrants issued for unlawful claims, with full knowledge of that fact, does not estop taxpayers or the county from asserting the invalidity of other outstanding claims of the same nature, for no county agent or official could ratify an act that he could not have done originally.—*Municipal Security Company v. Baker County*, 339.

ESTOPPEL BY RECEIVING BENEFIT.

13. The fact that a county has received benefits thereby does not preclude it from asserting the unlawfulness of warrants issued for voluntary obligations in excess of the constitutional limit.—*Municipal Security Company v. Baker County*, 339.

ESTOPPEL BY APPORTIONMENT OF DEBT.

14. Where no question of the constitutionality of warrants representing a county indebtedness was determined by commissioners appointed to apportion indebtedness between two counties, neither the counties nor their taxpayers are precluded from asserting the invalidity of such warrants as having been issued in excess of the constitutional limitation.—*Municipal Security Company v. Baker County*, 339.

COUNTY COURTS.

Presumption of Regularity in Opening Roads. See HIGHWAYS, 4.

Proceeding in Opening Public Roads. See HIGHWAYS, 5, 9, 10.

COUNTY ROADS.

Description in Petition for Private Road. See HIGHWAYS, 1, 3.

COURSES AND DISTANCES.

Description—Sufficiency—Definition of "Point." See DEEDS.

COURTS.

POWER OF CIRCUIT COURT ON APPEAL FROM COUNTY COURT.

1. On an appeal to the circuit court from a decree of a county court the cause is to be tried and finally settled—it may be remitted for further proceedings as directed, but not for a new trial.—*Re Plunkett's Estate*, 414.

2. Where a record on appeal from a county court to the circuit court fails to show all the evidence given at the trial, or the jurisdictional papers, the circuit court cannot do otherwise than dismiss the appeal for lack of jurisdiction. The fact that the parties appear, and the cause is thereupon determined, does not cure the defect.—*Re Plunkett's Estate*, 414.

TRIAL—POWER OF COURT TO CONTROL TESTIMONY.

3. Under the general power to control the conduct of a case a judge may *sua sponte* withdraw improper testimony from consideration by the jury, or may limit its application, particularly where counsel were notified on offering the testimony that such a ruling might be made at the conclusion of the trial.—*First National Bank v. Home Insurance Company*, 284.

COURTS—CONTROL OVER MEDICAL BOARD.

4. The proceedings of a board of medical examiners in refusing a license to practice to one applying therefor cannot, after such board has become *functus officio*, be revised by the courts where no proceeding was taken at the time to compel the board by mandamus to act.—*Miller v. Medical Board*, 5.

COLLATERAL ATTACK ON HIGHWAY PROCEEDINGS.

5. An action for trespass on plaintiff's premises defended on the ground that defendant entered on an established public road by authority of the road supervisor is a collateral attack on the proceeding establishing the road, and the only question which can be considered is that of the jurisdiction of the county court in the establishment of the road.—*Sveek v. Jorgensen*, 270.

REMANDING CAUSE FROM SUPREME COURT—LEAVE TO ANSWER.

6. Upon the remandment of a cause by the appellate court for further proceedings in the court below it is for the latter to determine in the first instance whether a party shall be given leave to plead over.—*Lieuallen v. Mosgrove*, 283.

CORRECTION OF ASSESSMENTS BY WRIT OF REVIEW.

7. The courts cannot, by a writ of review from the action of the state board of equalization, correct errors or irregularities of assessment committed by the different county assessors in making up their rolls.—*Dayton v. Board of Equalization*, 131.

REVIEW TO PROBATE COURTS.

8. A county court sitting for the transaction of probate business is an "inferior court" whose proceedings may be examined by a writ of review under Hill's Ann. Laws, § 585 as amended (Laws 1889, 135).—*Garnsey v. County Court*, 201.

9. A writ of review will not lie to revise the action of a probate court in passing on a claim presented against an estate, provided the proceedings are in due form.—*Garnsey v. County Court*, 202.

POWER OF SECRETARY OF THE INTERIOR—INDIAN PUBLIC LANDS.

10. A provision in a lease of allotted Indian lands that on the occurrence of certain contingencies the lease shall terminate and the lessor have a right to re-enter, does not authorize the Secretary of the Interior to determine whether such contingencies have happened—that question is judicial and not executive.—*Mosgrove v. Harper*, 253.

POWER OF COUNTY COURT OVER ASSESSMENT ROLL.

11. In the matter of assessing property the county court has only power to complete the matters left unfinished by the board of equalization,—it cannot, for example, change an assessment of its own motion after the board has adjourned.—*French v. Harney County*, 418.

DEPARTMENTS OF CIRCUIT COURT.

12. The provision of laws, 1883, p. 63, dividing the third judicial district into two departments, is directory only.—*State v. Gardner*, 140.

CRIMINAL LAW AND EVIDENCE.

I. Criminal Law, 1-35.

II. Criminal Evidence, 36-43.

JURISDICTION OF CIRCUIT COURT.

1. The provision of laws, 1883, p. 63, dividing the third judicial district into two departments, is directory only, and under the clause permitting any business of the court to be done in either department in which either judge may act the judge of department No. 1 may preside in a criminal proceeding, although the act provides that criminal proceedings shall be heard and determined in department No. 2.—*State v. Gardner*, 149.

COMPOUNDING CRIME—DEFENSES.

2. One charged with compounding and agreeing to conceal a crime for a consideration (Hill's Ann. Laws, § 1839) cannot set up as a defense that he subsequently arrested and prosecuted the person whom he had agreed to protect.—*State v. Ash*, 86.

3. An officer of the law who agreed for a reward to compound a crime and not to prosecute the guilty parties cannot escape responsibility for his conduct by showing that he acted under the direction of his superior officer and gave him the entire consideration.—*State v. Ash*, 86.

REMARKS OF PROSECUTING ATTORNEY.

4. Where, on a trial for larceny, a person already convicted of the same theft is introduced by the state, and refuses to testify, it is reversible error for the prosecuting attorney, where there was nothing to show any understanding between the witness and the defendant, to argue to the jury that the guilt of the accused was to be inferred from the refusal of the witness to testify.—*State v. Harper*, 524.

VENUE—EVIDENCE OF LOCATION.

5. The exact location of the boundary line between two counties is immaterial upon the question whether a crime was committed in the county in which the indictment was found, where any location of the boundary line that is claimed would place the scene of the crime in the county in which the indictment was found.—*State v. Branton*, 533.

IMPRISONMENT FOR FAILURE TO PAY FINE.

6. Under sections 2131 and 1408, Hill's Ann. Laws, giving to a justice of the peace the same power as to fines and imprisonments that is possessed by the circuit courts and prescribing how a judgment of fine in the latter court must be executed, a justice of the peace may order a defendant imprisoned if his fine is not paid.—*Ex parte McGee*, 165.

7. A provision in a city charter limiting punishment by imprisonment to ninety days does not affect the right of the municipal judge to inflict a fine, the working out of which under the general statutes will keep the offender in confinement longer than the prescribed limit, since in the latter case he is only paying a fine, while in the other case he is being imprisoned as a punishment.—*Ex parte McGee*, 165.

CONVICTION OF ACCOMPLICE AS A DEFENSE.

8. The conviction of one person charged as principal in the commission of a crime does not operate as an acquittal of another separately charged as principal in the commission of the same crime.—*State v. Branton*, 533.

FORMER JEOPARDY.

9. Acquittal of a charge of malicious destruction of personal property of another, under Hill's Ann. Laws, § 1778, is no bar to a prosecution for the illegal disinterment of a human body or the remains thereof, under section 1875, though the former prosecution related to the casket in which the body was inclosed.—*State v. Mayone*, 570.

TIME FOR OBJECTING TO GRAND JURY.

10. An objection that some members of a grand jury were irregularly selected must be made before plea.—*State v. Witt*, 594.

EFFECT OF IRREGULAR ORGANIZATION OF GRAND JURY.

11. The fact that a grand jury or one of its members is irregularly chosen under a valid law does not render its proceedings void.—*State v. Witt*, 594.

CRIMINAL LAW AND EVIDENCE—CONTINUED.

MOTION TO SET ASIDE INDICTMENT.

12. A defendant who resorts to a demurrer without filing a motion to set aside the indictment is thereafter precluded from making the objection for which his motion is otherwise appropriate. Under the statutes of this state such a motion must be made within the time after arraignment allowed to plead, although the argument may be postponed till a later time.—*State v. Smith*, 483.

INDICTMENT—NATURE AND CAUSE OF ACCUSATION.

13. The guaranty to an accused person by the Oregon constitution, article I, § 11, of the right to demand the nature and cause of the accusation against him is not infringed by charging an accessory before a crime as though he had directly committed the criminal act.—*State v. Branton*, 533.

INDICTMENT—DUPLICITY.

14. An indictment which in the same count charges the defendant as an accessory before the fact in the crime of murder, for which, under Hill's Ann. Laws, §§ 1228, 1728 and 2011, he may be found guilty as a principal and punished with death, and also as an accessory after the fact, the punishment for which, under sections 1220, 2012, 2014, is imprisonment in the penitentiary, is bad for duplicity.—*State v. Hinkle*, 93.

15. An indictment charging that defendant, being a male person over sixteen years of age, did forcibly ravish and have carnal sexual intercourse with a specified female child under sixteen years of age, charges common law as well as statutory rape, and is open to an objection for duplicity, which, however, is waived by failure to demur.—*State v. Lee*, 506.

DUPLICITY—WAIVER OF OBJECTION.

16. Error in overruling a demurrer to an indictment for duplicity is not waived by a plea of not guilty or cured by a judgment of conviction.—*State v. Hinkle*, 93.

AID BY VERDICT.

17. After a conviction on evidence of a forcible ravishment the allegations as to age will be rejected, the charge being complete without them.—*State v. Lee*, 506.

DISQUALIFICATION OF JURORS FOR BIAS.

18. The fact that proposed jurors stated on their *voir dire* that they had read an account of the inquest held over the body of the person for whose murder defendant was on trial, which purported to give the testimony of witnesses before the coroner's jury, and the verdict of such jury, and that they had heard the matter discussed, and, from what they had read and heard, had formed some opinion as to the guilt or innocence of defendant, will not disqualify them if it appears that the opinion was not of a fixed and determined character.—*State v. Olberman*, 558.

DUTY OF DISTRICT ATTORNEY TO CALL WITNESSES.

19. The prosecuting attorney is not required to call as witnesses all the persons present at the commission of an alleged crime, or any particular number of them whose attendance can be procured.—*State v. Barrett*, 191.

DEFENDANT AS A WITNESS—CROSS-EXAMINATION.

20. The defendant in a criminal action who voluntarily testifies in his own behalf may be cross-examined as to statements made in his preliminary examination contrary to his testimony on the trial, although he did not in his direct examination refer to the preliminary examination.—*State v. Hartness*, 110.

HARMLESS ERROR.

21. Evidence that there was a "scheme" between defendant charged with larceny of sheep and other persons to get away with certain sheep is not prejudicial to defendant on the ground that the word "scheme" suggested dishonesty and fraud where the witness testifies further that defendant wished to steal the sheep and invited witness and another person to join in the theft.—*State v. Welch*, 33.

22. Where witness testified that he thought he recognized a person whom he had seen taking away stolen property, error in permitting him to name such person was cured by his subsequent positive statement that he recognized defendant as the person.—*State v. Welch*, 33.

CRIMINAL LAW AND EVIDENCE—CONTINUED.

MISCONDUCT OF JURY.

23. A conviction in a capital case will not be set aside because, after having been ordered kept together during the trial, three jurors, accompanied by a bailiff in charge of the jury, separated from the rest, and went into a saloon, in which there was only one person, and drank liquor, nothing being said by anyone concerning the case.—*State v. Olberman*, 556.

24. It will not be set aside because, at another time during the trial, two jurors separated from the others, and, accompanied by a bailiff, went to their respective residences, neither of them going out of sight of the bailiff, and immediately returning to the other jurors, without conversing about the case with anyone, or hearing any statement in reference thereto.—*State v. Olberman*, 556.

NEW TRIAL—SURPRISE.

25. A new trial will not be granted on the ground of surprise where the party surprised failed to move immediately for a continuance and waited until after the verdict was rendered before making any effort to guard against the effects of the surprise.—*State v. Gardner*, 150.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

26. A new trial will not be granted on the ground of newly discovered evidence where such evidence merely tends to impeach the adversary's witnesses.—*State v. Gardner*, 150.

LARCENY—CONSENT OF OWNER.

27. Property is not taken without the owner's consent, within the meaning of the term larceny, where an authorized agent of the owner co-operates with the suspected thieves in planning and carrying out the asportation.—*State v. Hull*, 56.

FALSE PRETENSES—FALSE TOKEN.

28. A person is not indictable for obtaining money by means of a false token and false pretenses, under sections 1776 and 1872, Hill's Ann. Laws, where he procures money from a woman by a promise of marriage, and by offering himself to her under a fictitious name, and by falsely stating that he is unmarried, since he is not himself a false token.—*State v. Renick*, 534.

HOMICIDE—EVIDENCE OF THREATS.

29. An instruction on a trial for murder that evidence of threats by the deceased or a previous quarrel may be considered by the jury if the circumstances raise a doubt as to whether defendant acted in self-defense in order to aid them in determining who was the aggressor is not prejudicial to defendant where he is convicted of manslaughter only, and if the jury had not considered such evidence the verdict must have been a finding that defendant was guilty of murder in the first or second degree.—*State v. Bartness*, 111.

USE OF DEADLY WEAPON.

30. An instruction that "an intent to murder is conclusively presumed from the deliberate use of a deadly weapon, causing death within a year, if not done in self-defense or in the rightful and necessary defense of property," is cured by a modification to the effect that "this does not raise a presumption of murder in the first degree; it only uses the term 'murder,' and cannot raise a presumption greater than murder in the second degree."—*State v. Bartness*, 111.

FORCE TO EXPEL TRESPASSERS—HOMICIDE.

31. The right within a reasonable time to employ sufficient force to expel a person who unlawfully intrudes on one's premises after having been warned to depart does not extend beyond the limits of the dwelling and the customary out-buildings.—*State v. Bartness*, 111.

WHEN CHARGE ON INSANITY MAY BE GIVEN.

32. An instruction on insanity is justified when defendant offers testimony tending to show that he was insane, although there was no such plea. Under the Oregon statutes a plea of insanity is inadmissible, but such defense is interposed whenever the defendant introduces testimony tending to show the state of his mind when the crime with which he was charged was committed.—*State v. Branton*, 534.

RAPE BY BOY UNDER AGE.

33. A boy under sixteen years of age is guilty of rape if he forcibly ravishes a female.—*State v. Lee*, 506.

CRIMINAL LAW AND EVIDENCE—CONCLUDED.

APPEAL BY STATE IN CRIMINAL CASE.

34. The state cannot appeal from any order or judgment in a criminal case, except those mentioned in sec. 1430, Hill's Ann. Laws; so that no appeal lies with the state from a judgment of acquittal, even if entered on a verdict ordered by the trial judge.—*State v. Minnick*, 158.

APPEAL—FORMER ACQUITTAL.

35. An appeal did not lie at common law from a judgment sustaining a plea of former acquittal.—*State v. Minnick*, 158.

COMPETENT EVIDENCE OF SURROUNDINGS.

36. On a trial for murder evidence is admissible to the effect that the tracks of the deceased occurred at regular intervals to the point where he fell, although there were many tracks around the body, but no others in the furrow where the deceased was walking, as bearing on the question whether the deceased made any hostile advances on defendant.—*State v. Bartmess*, 110.

HOMICIDE—OPINION EVIDENCE ON POSITION OF BODY.

37. The fact that a witness has seen the bodies of several deceased persons in the positions where they fell after being shot does not render him an expert on falling bodies.—*State v. Barrett*, 194.

38. The opinion of a witness that the body of the deceased at the time he saw it did not lie in the position in which it fell when the person was shot is not competent evidence, where it appeared that the position of the body and the surroundings of the place could all be accurately described. Under such circumstances the jury are to draw their own conclusions.—*State v. Barrett*, 194.

DECLARATIONS OF CO-CONSPIRATOR AS EVIDENCE.

39. Statements made by a co-conspirator after the common enterprise has ended, and not in the presence of the accused, are not competent evidence against the latter.—*State v. Hinkle*, 93.

EVIDENCE OF ACCOMPLICE WILL SUSTAIN CONVICTION.

40. Under Hill's Ann. Laws, §§ 1280, 2011, abrogating the distinction between principals and accessories, and providing that an accomplice may be indicted and tried as a principal, evidence that defendant was an accomplice is sufficient to sustain a conviction under an indictment charging him as a principal.—*State v. Branton*, 533.

SUFFICIENCY OF EVIDENCE.

41. The testimony in this case is such as to imperatively require it to be submitted to the jury, and a motion to direct an acquittal was properly overruled.—*State v. Branton*, 533.

ERROR CURED BY SUBSEQUENT EVIDENCE.

42. Error, if any, in refusing to permit a witness to be examined concerning his hostility towards relatives of the accused was cured where his subsequent cross-examination disclosed his condition of mind towards such persons.—*State v. Welch*, 33.

BIAS OF WITNESS—LIMIT OF CROSS-EXAMINATION.

43. While it is always competent to show the feeling entertained by a witness toward a person about whom he is testifying, such inquiry must be limited to the feeling for or against that person.—*State v. Welch*, 33.

CRITICISED CASES. same as CASES FROM OREGON REPORTS.

CROPS.

TENANCY IN COMMON.

The relation of tenancy in common between the landlord and tenant in the crop produced by the latter is never created where there is a cash rental.—*Hartgett v. Beardsley*, 401.

CROSS-EXAMINATION.

Relation of Cross and Redirect Examinations. See WITNESSES, 2, 3.

Bias of Witness—Limit of Cross-Examination. See WITNESSES, 10.

Defendant as a Witness—Extent of Cross-Examination. See CRIM. LAW, 20.

DAMAGES.

INJURIES TO PREMISES—RIGHTS OF LESSEE.

A lessee in possession of property which is destroyed through another's negligence may recover the value of its use for the unexpired term of the lease.—*Townley v. Oregon Railroad Company*, 323.

DEADLY WEAPON.

Presumption Arising From Deliberate Use of. See CRIMINAL LAW, 30.

DEATH.

CHARACTER OF ACTION FOR DEATH BY WRONGFUL ACT.

1. The right conferred by sections 369 and 371, Hill's Ann. Laws, permitting a personal representative to maintain an action for decedent's wrongful death, is an entirely new one conferred by the statute, and is based on the death of the injured person, not on the injury that caused it, so the right of action exists though the decedent may have been instantly killed.—*Perham v. Portland Electric Co.*, 451.

DEATH BY WRONGFUL ACT—WANT OF RELATIVES.

2. The fact that there are no surviving relatives or creditors of a person killed by a wrongful act or omission does not preclude a right of action by the personal representatives under Hill's Ann. Laws, §§ 369, 371, making the recovery assets of the estate.—*Perham v. Portland Electric Co.*, 451.

DECEDENT'S ESTATES. Same as EXECUTORS AND ADMINISTRATORS.

DECREES.

ISSUES MADE BY THE PLEADINGS.

1. A decree which charges the plaintiff's maintenance upon land conveyed by her in consideration of future support is within the issue made by the pleadings where it is alleged that to secure a home and care the plaintiff transferred her property as a gift, and the reply denies that the defendant agreed to clothe and support the plaintiff in consideration of the title received.—*Patton v. Nixon*, 159.

COLLATERAL ATTACK ON ROAD RECORD.

2. Where one defends against an action of trespass on the ground that he was on a public road the plaintiff is collaterally attacking the final order of the county court establishing the road.—*Sweck v. Jorgensen*, 270.

DEEDS.

SUFFICIENCY OF DESCRIPTION IN DEED—COURSES.

1. A description of a tract as commencing at a given spot, "running thence one point east of south * * * thence one point west of north" * * * is sufficiently accurate to be identified, since it appears that a "point" is a division of a mariner's compass equal to 11° 15'.—*Hayden v. Brown*, 221.

CONSTRUCTION OF DEED—DESCRIPTION.

2. When, by omitting one part of a false or impossible description in a deed, a perfect description remains, the false part should be rejected, and the instrument upheld.—*Hayden v. Brown*, 221.

DELIVERY.

3. An absolute delivery of a deed takes place where the grantor, being satisfied that he cannot recover from a dangerous illness, delivers it to the husband of the grantee with a direction that it shall be recorded after his death, and does not subsequently refer to the matter, though the husband says he would have returned the deed to him at any time, if he had requested it.—*Payne v. Haultgarth*, 430.

DE FACTO OFFICERS.

Validity of Official Acts as to Third Persons. See OFFICERS, 1.

DEFINITIONS. Same as WORDS AND PHRASES.

DELIVERY.

When Delivery of Deed is Effected. See DEEDS, 3.

When Delivery of Gift is Accomplished. See GIFT.

DEMAND.

Presentment of Paper Issued by Insolvent Corporation—Rights of Indorser.
See **BILLS AND NOTES**.

DESCRIPTION.

Sufficiency of Description in Deed. See **DEEDS**, 1, 2.

DISBURSEMENTS. Same as Costs.

DISCRETION OF COURT.

Amending Pleadings at Trial. See **PLEADINGS**, 8.

Orders Concerning New Trials and Verdicts. See **NEW TRIAL**.

Allowance of Compensation to Assignee. See **INSOLVENTS**.

DISMISSAL. Same as Nonsuit.

DISMISSING OF APPEAL.

Failure to File Briefs—Reasonableness of Excuse. See **APPEAL**, 16, 17.

DISTRICT ATTORNEY.

DUTY AS TO CALLING ALL KNOWN WITNESSES.

The prosecuting attorney is not required to call as witnesses in a criminal case all the persons present at the commission of the alleged crime, or any particular number of them whose attendance can be procured.—*State v. Barrett*, 194.

DITCHES.

Reservation of Vested Rights—Statutes—Rights of Prior Appropriator—Easement. See **WATERS AND WATER RIGHTS**, 2, 3, 4.

DIVERSION OF WATER.

Confirmation of Local Customs of Western States as to Rights of Prior Appropriators. See **WATERS**, 1.

DOWER.

RIGHTS IN LAND HELD AS TRUSTEE.

A widow is entitled to dower in land conveyed to her by her husband during his lifetime, but as to which she is held to be a trustee *ex maleficio* for the heirs because of her fraud in procuring the conveyance.—*Parriah v. Parriah*, 486.

DUE PROCESS OF LAW.

Notice to Owner of Condemnation for Road. See **HIGHWAYS**, 7.

DUPLICITY.

Indictments—Waiver of Objection. See **CRIMINAL LAW**, 14, 15, 16.

EASEMENT.

WATERS—DITCH EASEMENT.

A prior appropriator who owns a ditch across lands subsequently patented by the state to another person, has the right to enter on such lands to clean and repair the ditch.—*Carson v. Gentner*, 512.

ELECTIONS.

CERTIFICATES OF NOMINATION.

Under section 45 of the election law of 1891, the secretary of state is not required to certify to the various county clerks that any candidate is the nominee of a particular party.—*Sears v. Kincaid*, 215.

ELECTRICITY.

CARE REQUIRED OF ELECTRIC COMPANIES.

1. The care demanded of electric companies must be commensurate with the danger, and, where the wires carry a highly dangerous current of electricity, the law requires the utmost degree of care in the construction, inspection and repair of the wires so as to keep them harmless at places where persons are liable to come in contact with them.—*Perham v. Portland Electric Co.*, 451.

NEGLIGENCE IN PLACING ELECTRIC WIRES.

2. The owner of electric wires carrying a dangerous current is chargeable with negligence in stringing them over a bridge so near the top of it that it is impossible to make repairs on the bridge without coming in contact with them.—*Perham v. Portland Electric Company*, 451.

3. A workman engaged in repairing a bridge over which electric wires with an apparently safe insulation are strung where he must come in contact with them in performing his work has a right to assume that contact with them will not be dangerous.—*Perham v. Portland Electric Company*, 451.

4. Placing electric wires known to be dangerous at a place where others are lawfully entitled to be constitutes negligence.—*Perham v. Portland Electric Company*, 451.

IMPERFECT INSULATION.

5. The apparent perfect insulation of electric wires, which is calculated to deceive and to cause one unfamiliar with the facts to suppose them safe, when the wires are placed where persons in the performance of their duties may come in contact with them, amounts to an invitation to them to risk contact therewith.—*Perham v. Portland Electric Company*, 451.

QUESTION FOR JURY—CARE TO AVOID INJURY.

6. Whether a person exercised such care to prevent injury from electric wires as an ordinarily careful person usually exercises under similar circumstances is a question for the jury.—*Perham v. Portland Electric Company*, 451.

EQUALIZATION OF TAXES.

Jurisdiction of State Board of Equalization. See TAXATION, 1.

Record on Which State Board Proceeds. See TAXATION, 1, 2.

Uniformity of Classification Necessary. See TAXATION, 4, 6.

EQUITY.

RELIEF AGAINST JUDGMENT—FALSE RETURN.

1. Equity has jurisdiction to enjoin the enforcement of a judgment at law based on a false return of service of summons.—*Huntington v. Crouter*, 408.

RELIEF TO AVOID MULTIPLICITY OF ACTIONS.

2. Equity will grant relief to one who has made a conveyance of property in consideration of her future support, although the plaintiff has a remedy at law, and to avoid a multiplicity of actions will make the maintenance of the plaintiff a charge upon the premises.—*Patton v. Nixon*, 159.

REMEDY AT LAW—JURISDICTION OF EQUITY.

3. A court of equity, after sustaining an arbitration and award, in a suit to set aside the award and recover on the policy, cannot decree a recovery as to items not submitted to arbitration, for there is an adequate remedy at law by an action for their value.—*Stemmer v. Scottish Insurance Company*, 66.

JURISDICTION IN FORECLOSING BOND FOR DEED.

4. A court of equity has jurisdiction of a suit to foreclose the interest of an obligee in a bond for a deed of real estate whether the plaintiff is in possession of the property or not, and the provision of Hill's Ann. Laws, § 504, is not applicable.—*Security Savings Company v. Mackenzie*, 200.

TENDER OF DEED NOT NECESSARY.

5. A failure to tender performance before suit is no defense to a suit by a vendor who has given a bond for a deed of real estate to have the equitable interest of the purchaser barred and foreclosed.—*Security Savings Company v. Mackenzie*, 200.

EQUITY—CONCLUDED.

NEITHER SALE OR REDEMPTION.

6. Section 414 of Hill's Ann. Laws, providing for sale and redemption of mortgaged realty, has reference only to the foreclosure of liens that are security for debts, and does not apply to a suit to bar the equitable interest of the grantee in a bond for a deed.—*Security Savings Company v. Mackenzie*, 200.

ATTACK ON ADJUDICATED LEGAL TITLE.

7. Where the title to chattels has been adjudicated it is conclusive in a garnishment proceeding against their holder, in the absence of fraud—the remedy, if any, is in equity.—*Schneider v. Lee*, 578.

EQUITY MAXIMS. Same as MAXIMS.

ERROR. Same as APPEAL AND ERROR.

ESTATES OF DECEDENTS. Same as EXECUTORS.

ESTOPPEL.

ESTOPPEL TO DENY EQUITABLE JURISDICTION.

1. An objection in an equity suit that plaintiff has an adequate remedy at law cannot be raised by a defendant who has by his own answer asked equitable relief.—*Municipal Security Company v. Baker County*, 338.

PAYMENT OF UNLAWFUL INDEBTEDNESS NOT AN ESTOPPEL.

2. The fact of payment of claims allowed beyond the constitutional limit of a county's indebtedness will not estop taxpayers or the county from asserting the invalidity of other claims of the same nature outstanding, since county officials have no power of ratification as to such liabilities.—*Municipal Security Company v. Baker County*, 338.

BY RECEIVING BENEFIT.

3. A county, by receiving benefits, is not estopped to assert the invalidity of warrants issued in excess of the constitutional limit of indebtedness.—*Municipal Security Company v. Baker County*, 338.

BY APPORTIONMENT OF DEBT.

4. Where no question of the constitutionality of warrants representing a county indebtedness was determined by commissioners appointed to apportion indebtedness between two counties, neither the counties nor their taxpayers are precluded from asserting the invalidity of such warrants as having been issued in excess of the constitutional limitation.—*Municipal Security Company v. Baker County*, 338.

ESTOPPEL.

5. A municipality will be estopped to enforce the performance of a contract under the same or like conditions that an individual will be estopped to proceed against it.—*Portland v. Bituminous Paving Company*, 308.

EVIDENCE. See also CRIMINAL LAW, 38-48.

EXPERT AND OPINION EVIDENCE DISCUSSED.

1. The character and variety of expert evidence is here discussed, and the exceptions to the general rule fully explained.—*First National Bank v. Fire Association*, 172.

2. It is not sufficient to warrant the introduction of expert testimony that the witness may know more of the subject of inquiry and may better comprehend and understand it than the jury, but the inquiry must relate to some subject wherein skill imparts a superior knowledge which persons of average intelligence may not be presumed to possess.—*First National Bank v. Fire Association*, 172.

EXCEPTION TO RULE ON OPINION EVIDENCE.

3. A skilled witness may be allowed to add his opinion as to the conclusion to be drawn from certain facts and circumstances which have come under his personal observation, where they are otherwise incapable of being detailed and described so as to enable anyone but the observer himself to form an intelligent conclusion from them, although the matter referred to is not of itself a proper subject of expert testimony.—*First National Bank v. Fire Association*, 172.

EVIDENCE—CONTINUED.

4. Under this exception it is competent for skilled firemen, in connection with their descriptions of a fire, to state whether or not in their opinion it was burning naturally or whether some inflammable substance had been distributed about the premises.—*First National Bank v. Fire Association*, 172.

SUBJECT OF EXPERT TESTIMONY.

5. Whether or not a fire in a certain store stocked with certain goods could have spread to the upper floor of the building within a given time, and whether under the given circumstances and within a certain time it would have generated sufficient explosive power to blow open doors, etc., is a proper subject of expert testimony.—*First National Bank v. Fire Association*, 172.

6. The opinion of skilled firemen that a fire was not such as would naturally result from the burning of insured's stock of goods without the aid of more inflammable matter, and that the fire would not have spread to the upper floor as rapidly as it did, or have forced open iron doors and shutters in the building, if it had been burning from natural causes, is admissible as expert evidence in connection with their description of the appearance and character of the fire.—*First National Bank v. Fire Association*, 172.

7. Plaintiff in an action for property injured and destroyed by defendant's negligence cannot, without laying the foundation therefor by showing that he is possessed of sufficient knowledge to form an intelligent estimate, give his opinion as to the value of the different articles of property injured and destroyed.—*Townley v. Oregon Railroad Company*, 323.

8. The fact that a witness has seen the bodies of several deceased persons in the positions where they fell after being shot does not render him an expert on falling bodies.—*State v. Barrett*, 194.

9. The opinion of a witness that the body of the deceased at the time he saw it did not lie in the position in which it fell when the person was shot is not competent evidence, for it appeared that the position of the body and the surroundings of the place could all be accurately described, and under such circumstances the jury are to draw their own conclusions.—*State v. Barrett*, 194.

EVIDENCE OF POSTING NOTICES FOR OPENING ROAD.

10. Posting of notices in three public places within the vicinity of a proposed road is sufficiently shown by affidavits designating the places where notices were posted, as a barn on the line of road, the barn of V. and a fence at the east end of the road, and a recital in the journal entry of the court appointing viewers that it appeared that the notice had been posted in "three of the most public places along the line of the proposed road".—*Sveek v. Jorgensen*, 270.

EVIDENCE OF MOTIVE FOR INCENDIARISM.

11. Though the pleadings admit that the insured sustained a loss exceeding the amount of insurance, yet it is competent to show that the stock was old and undesirable, as a motive for burning it.—*First National Bank v. Fire Association*, 172.

RETURN ON PROCESS AS EVIDENCE.

12. An officer's return on a process delivered to him for service is *prima facie* evidence of the material matters therein stated, but it may be contradicted.—*Huntington v. Crouter*, 408.

SALES.

13. It is competent for the purpose of establishing the plaintiff's right to recover the balance of the purchase price due under a contract of sale executed by her husband acting as her agent to show that the property sold belonged to her.—*Mullaney v. Evans*, 331.

EVIDENCE INCONSISTENT WITH THEORY OF CASE.

14. In an action upon an insurance policy, where the defense is that the fire was incendiary by the procurement of the insured, testimony that one of the insured's employ was reputed to be an incendiary is inadmissible, as too remote, where the case was not tried upon a theory consistent with such employee's agency in causing the fire.—*First National Bank v. Commercial Assurance Co.*, 43.

EVIDENCE OF PRINCIPAL AS TO AGENCY.

15. Plaintiff may, in support of her contention that the money due on a sale of her property by her agent should have been paid to her instead of to a garnishing creditor of the agent, testify that the purchasers paid her through such agent a certain amount on account of the purchase.—*Mullaney v. Evans*, 331.

EVIDENCE—CONCLUDED.

IMPEACHMENT.

16. For the purpose of deprecating the value of a witness's testimony, it may be shown, on proper foundation, that the person has made out of court statements on the matter in question contradicting his evidence in court.—*Farmer's Bank v. Saling*, 395.

TRIAL—VALUE OF EVIDENCE.

17. Where a witness testifies to facts as of his own knowledge, and on cross examination it appears that his sources of knowledge are meager, his testimony ought not to be stricken out; its value being for the jury.—*Farmer's Bank v. Saling*, 395.

TRESPASS—PLEADING AND PROOF.

18. In trespass, where land is described as a particular lot, without giving metes and bounds, the evidence must be confined solely to that lot, and will not include trespass on other realty belonging to plaintiff.—*Barnhart v. Ehrhart*, 274.

EVIDENCE OF PARTNERSHIP.

19. Testimony that witness had left money on deposit with a firm on the faith and credit of defendant is inadmissible to prove defendant's membership in the firm.—*Farmer's Bank v. Saling*, 395.

20. To prove a person's membership in a firm, letterheads and sacks on which his name is printed as a firm member, used by such firm in its business at a date subsequent to the time of incurring the liability sued on, are admissible in corroboration of other independent evidence on that issue.—*Farmer's Bank v. Saling*, 395.

21. On an issue whether one of the defendants was a member of a firm which signed certain notes, it was competent to offer in evidence the notes and letters dated some months later, but signed in the same handwriting and written on letterheads having the name of the defendant as one of the partners. The documents, being signed by the same person, are *prima facie* evidence that the firm whose name was signed to the note was the same firm whose names appear on the letterhead.—*Farmer's Bank v. Saling*, 395.

22. On an issue of the membership of a firm to which a loan had been made, there being two firms of the same name, testimony of the lender as to which one of the firms he understood he was lending the money to is admissible.—*Farmer's Bank v. Saling*, 394.

23. To prove defendant's membership in a firm, testimony that witnesses understood or believed defendant to be a member is admissible, where such witnesses state the facts on which they derive their understanding or belief, and such facts are proper for the consideration of the jury.—*Farmer's Bank v. Saling*, 394.

DECLARATIONS OF ABSENT CONSPIRATOR.

24. Statements made by a co-conspirator after the common enterprise has ended, and not in the presence of the defendant, are not competent evidence against the latter.—*State v. Hinkle*, 93.

EXAMINATION OF WITNESSES.

Limits of Cross and Redirect Examinations. See TRIAL, 12, 13, 14.

EXCEPTIONS. See also BILLS OF EXCEPTIONS.

Sufficiency of Exception to a Series of Instructions. See APPEAL, 15.

EXECUTION.

PAYMENT BY SOMETHING OTHER THAN MONEY.

1. It is immaterial that a judgment debtor does not offer an account as part payment of the execution, if it is taken and accepted by the creditor from the sheriff as such payment, and the debtor subsequently acquiesces therein.—*Barr v. Rader*, 375.

QUASHING EXECUTION SALE.

2. An execution issued on a transcript from a justice's court will be quashed, and a sale thereunder set aside, where the judgment recovered on an appeal was paid before the sheriff's deed had issued, for the judgment of the lower court had become merged into the one rendered by the circuit court, which was already paid.—*Gobbi v. Refrano*, 26.

EXECUTORS AND ADMINISTRATORS.

REMOVAL OF ADMINISTRATOR—EFFECT ON APPEAL.

1. After an administrator has been removed he no longer has authority to represent the estate, and an appeal taken by him while in office will be dismissed unless his successor desires to continue it.—*Knight v. Hamaker*, 154.

EFFECT OF REMOVING ADMINISTRATOR.

2. An appeal from an order deposing an administrator does not suspend the operation of the order; the removal is in force until reinstatement. Such is evidently the effect of Hill's Ann. Laws, §§ 1090, 1098 and 1100.—*Knight v. Hamaker*, 154.

EXEMPTIONS.

CONSTRUCTION OF EXEMPTION LAWS.

1. Exemption statutes have no extra-territorial operation, and do not form any part of the contract between debtor and creditor, being merely a part of the remedy.—*Bond v. Turner*, 551.

EXEMPTION—NONRESIDENT.

2. The right to claim the benefit of statutory exemptions is open to nonresidents as well as residents, unless there is some restriction, which is not the case with section 282, Hill's Ann. Laws.—*Bond v. Turner*, 551.

EXPERT EVIDENCE.

Character and Variety of Expert Evidence Discussed. See EVIDENCE, 1-9.

An Exception to the General Rule on Expert Evidence. See EVIDENCE, 3, 4.

FALSE PRETENSE. See CRIMINAL LAW, 28.

FALSE TOKEN. See CRIMINAL LAW, 28.

FARM LEASE. See LANDLORD AND TENANT, 1.

FEES of Witnesses. See COSTS, 2.

FILING BRIEFS. See RULES OF COURT.

FINAL ORDERS. See APPEAL.

FINES—Imprisonment. See CRIMINAL LAW, 6, 7.

FILING TRANSCRIPT in Supreme Court. See APPEAL, 14.

FINDINGS OF FACT.

TRIAL COURT MUST MAKE FINDINGS.

It is the imperative duty of a law court *sua sponte*, when hearing a cause without a jury, to make findings of fact on all the material issues presented by the pleadings, and if this has not been done the case will be reversed.—*Breding v. Williams*, 391.

FIRE INSURANCE. See INSURANCE.

FORECLOSURE.

Examples of Rule Against Litigating Paramount Title. See MORT., 2, 3.

Bond for Deed—No Sale or Redemption. See MORTGAGES, 6.

FORMER CONVICTION of an Accomplice no Defense. See CRIMINAL LAW, 8.

FORMER JEOPARDY. See CRIMINAL LAW, 9.

FOUNDATION FOR IMPEACHMENT. See WITNESSES, 4, 9.

FRAUD.

EVIDENCE TO OVERCOME PRESUMPTION.

The presumption that a deed of absolute conveyance, unambiguous in its terms, expresses the intent of the parties at the time of the execution cannot prevail where fraud vitiates the conveyance itself.—*Parrish v. Parrish*, 486.

FRAUDS, STATUTE OF. Same as STATUTE OF FRAUDS.

FRAUDULENT REPRESENTATION.

When Grantee Knows all the Facts. See **VENDOR AND PURCHASER**, 1.

Rescission of Sale—Failure of Title. See **VENDOR AND PURCHASER**, 2, 3, 4.

“FULL AMOUNT OF SUCH LOSS.” See **WORDS AND PHRASES**.

GARNISHMENT, Same as **ATTACHMENT**.

GENERAL APPEARANCE.

Waiver of Regularity of Service by Appearing. See **APPEARANCE**.

GENERAL ASSIGNMENT.

Compensation of Assignee Is Discretionary. See **ASSIGN. FOR CRED.**

GIFTS.**WHAT CONSTITUTES DELIVERY.**

1. In order to constitute a delivery of a gift there must be a complete parting with the control over the alleged subject matter with a present design that the title shall at once pass completely to the donee.—*Liebe v. Battmann*, 241.

2. No such delivery as is essential to a valid gift takes place where a note is indorsed by the holder and placed in an envelope addressed to a designated person, and the envelope placed on a table in the room of the writer, who shoots himself and dies sometime after without any further direction as to the note. *Liebe v. Battmann*, 241.

GOVERNMENT LANDS. Same as **PUBLIC LANDS**.

GRAND JURY.

Regularity of Selection—Time for Objecting. See **CRIMINAL LAW**, 10, 11.

GUARDIAN AND WARD.**COLLATERAL ATTACK ON SHAM SALE OF INFANT'S LAND.**

1. Fictitious proceedings in the county court by which the land of an infant is transferred to a third person who had previously executed a mortgage thereon in pursuance of a scheme to mortgage the infant's land are not entitled to the force and effect of a judgment, and may be collaterally attacked in a suit to foreclose the mortgage.—*Conklin v. La Dow*, 854.

POWER OF GUARDIAN TO MORTGAGE.

2. A guardian who has no power under the statute to mortgage the land of his ward cannot indirectly encumber it by making a sham sale to a third party who executed a mortgage thereon.—*Conklin v. La Dow*, 355.

HARMLESS ERROR. See **APPEAL AND ERROR**, 26-31.

HIGHWAYS.**ROAD OF PUBLIC EASEMENT—DESCRIPTION IN PETITION.**

1. A petition for the location of a private road, under sections 4075 to 4079, inclusive, of Hill's Ann. Laws need not contain any statements except those provided in said sections—the termini need not be described.—*Towns v. Klamath County*, 225.

2. The location of a road of public easement laid out under Hill's Ann. Laws, §§ 4075-4079, is described with sufficient accuracy to enable persons interested to locate it with reasonable certainty, where the petition states its beginning to be at a point near the barn of the petitioner and thence along the present traveled road to an intersection with another road named.—*Towns v. Klamath County*, 225.

3. A petition in a proceeding for the location of a road of public easement setting out the location of petitioner's residence in reference to its proximity and accessibility to any established highway, the impossibility of obtaining the location of a public road under the general road laws for want of a sufficient number of resident petitioners, that at the time of his settlement there was along the route of the proposed road a well-established highway over public lands which had subsequently to his settlement come into the possession of one who refused to permit the petitioner or the public to travel over such road, and alleging that his residence cannot be reached by or for travel over any convenient or other public road previously provided by law, and that it is necessary for the public and the petitioner to have access to and egress from his residence, is sufficient.—*Sullivan v. Cline*, 280.

HIGHWAYS—CONCLUDED.

PRESUMPTION OF REGULARITY—ROAD PROCEEDINGS.

4. After a county court has acquired jurisdiction in a proceeding for locating a public road the same presumptions prevail regarding its proceedings as would prevail concerning courts of general jurisdiction. Therefore it will be presumed on appeal that persons appointed as viewers of a proposed road were "disinterested freeholders" as required by statute, when the contrary is not shown.—*Towns v. Klamath County*, 226.

WAIVER OF SERVICE OF ORDER APPOINTING VIEWERS.

5. One who appeared in the county court and contested upon the merits a proceeding to locate a public road cannot thereafter complain that there was no sufficient service of a copy of the order appointing viewers.—*Towns v. Klamath County*, 226.

ESTABLISHING HIGHWAYS—PUBLIC USE.

6. Sections 4075-4079, Hill's Ann. Laws, providing for locating a county road from residences not reached by a convenient road to some other public road, are not unconstitutional as condemning private property for private use, since the road when open will be at the disposal of the entire public.—*Towns v. Klamath County*, 225; *Sullivan v. Cline*, 280.

CONSTITUTIONAL LAW—NOTICE.

7. Sections 4075-4079, Hill's Ann. Laws, providing for the establishment of roads of public easement to private residences by condemning private property therefor, are not invalid because they made no provision for notice to a non-consenting landlord of the intended application for a road, since at a subsequent stage of the proceedings he may appeal from the award of damages to a court of general jurisdiction.—*Sullivan v. Cline*, 280; *Towns v. Klamath County*, 225.

COLLATERAL ATTACK—JURISDICTION.

8. An action for trespass on plaintiff's premises defended on the ground that defendant entered on an established public road by authority of the road supervisor is a collateral attack on the proceeding establishing the road, and the only question which can be considered is that of the jurisdiction of the county court in the establishment of the road.—*Sweek v. Jorgensen*, 270.

PETITION FOR HIGHWAY—SUFFICIENCY OF NOTICE.

9. Notice that, at a session of the "county court for — county," a petition will be presented to "said court" to establish a road "within said county" along a certain line in H. county, sufficiently shows, as against collateral attack, that the petition is to be presented to the county court of H. county.—*Sweek v. Jorgensen*, 270.

EVIDENCE OF POSTING NOTICES.

10. Posting of notices in three public places within the vicinity of a proposed road is sufficiently shown by affidavits designating the places where notices were posted, as a barn on the line of road, the barn of V. and a fence at the east end of the road, and a recital in the journal entry of the court appointing viewers that it appeared that the notice had been posted in "three of the most public places along the line of the proposed road".—*Sweek v. Jorgensen*, 270.

HOMESTEAD.

EFFECT OF JUDICIAL SALE OF HOMESTEAD.

One who has acquired land as a homesteader under Rev. Stat. U. S., § 2296, may recover possession of the land from one who purchased at a sale under an execution on a judgment based on a debt contracted prior to the actual issuing of the patent although evidenced by a note executed after its issuance.—*Schultz v. Levy*, 373.

HOMICIDE.

Presumption From Use of Dangerous Weapon—Right to Repel Intruder—Threats—Self-Defense. See CRIMINAL LAW, 28, 30, 31.

HOSTILITY OF WITNESS. Limit of Cross Examination. See TRIAL, 14.

HUSBAND AND WIFE.

PRESUMPTION AS TO CONVEYANCE.

1. The presumption that a purchase of land by a husband in the name of his wife was an advance or settlement, and not a trust, is disputable and may be overcome by evidence that such was not the intention of the parties nor the nature of the transaction relied upon.—*Parrish v. Parrish*, 486.

HUSBAND AND WIFE—CONCLUDED.

CONVEYANCE TO WIFE—FRAUD.

2. The presumption that a deed of absolute conveyance, unambiguous in its terms, expresses the intent of the parties at the time of its execution cannot prevail where fraud vitiates the conveyance itself.—*Parrish v. Parrish*, 486.

IMPANELING JURY.

Rejecting Jurors for Opinion Already Formed. See TRIAL, 25.

IMPEACHMENT OF WITNESS.

Insufficient Foundation for Impeachment. See WITNESSES, 1.

Showing Place Where Conversation Occurred. See WITNESSES, 5.

Limitation of Right to Impeach One's Own Witness. See WITNESSES, 8.

Naming Persons Present When Conversation Occurred. See WITNESSES, 7.

Defendant as a Witness—Previous Statements. See WITNESSES, 4.

IMPLEMENTS OF TRADE.

Stationery and Glove Boxes are not Included. See INSURANCE, 14.

IMPLIED TRUST. See TRUSTS.

IMPRISONMENT.

Non-Payment of Fine—Justice of the Peace. See CRIMINAL LAW, 6, 7.

INDIANS.

INDIAN LANDS—POWER OF SECRETARY OF INTERIOR.

1. The Secretary of the Interior has no power to cancel a lease of land that has been allotted to an Indian, and by him leased pursuant to the prescribed regulations with the approval of such secretary, and this for at least three reasons: (1) The lessee has acquired a vested interest of which he cannot be deprived without some legal proceeding, (2) the power to cancel has not been conferred on the secretary by congress, and (3) the exercise of this unwarranted authority is not necessary for the protection of the Indians or the public, since the courts afford appropriate relief in cases of wrong.—*Mosgrove v. Harper*, 252.

2. The Secretary of the Interior is not authorized under the law giving him supervision of Indian affairs to cancel a lease of allotted lands regularly made by an Indian pursuant to law; nor does the secretary derive such power from the law making him the superior officer of the land department with control over the proceedings for acquiring title to public lands.—*Mosgrove v. Harper*, 252.

INDICTMENTS.

Waiver of Objection of Duplicity. See CRIMINAL LAW, 15, 16.

Examples of Duplicitous Indictment. See CRIMINAL LAW, 14, 15.

Statement of Nature and Cause of Accusation. See CRIMINAL LAW, 13.

Motion to Set Aside—When Must be Made. See CRIMINAL LAW, 12.

INFANTS.

JUDGMENTS—COLLATERAL ATTACK.

1. Fictitious proceedings in the county court by which the land of an infant is transferred to a third person who had previously executed a mortgage thereon in pursuance of a scheme to mortgage the infant's land are not entitled to the force and effect of a judgment, and may be collaterally attacked in a suit to foreclose the mortgage.—*Conklin v. La Dow*, 354.

MORTGAGE.

2. A guardian who has no power under the statute to mortgage the land of his ward cannot indirectly encumber it by making a sham sale to a third party who executed a mortgage thereon.—*Conklin v. La Dow*, 355.

INFERIOR TRIBUNAL.

County Court Transacting Probate Business. See COURTS, 8.

INSANITY.

When an Instruction on That Subject is Proper. See CRIMINAL LAW, 32.

INSOLVENTS AND INSOLVENCY.

COMPENSATION OF ASSIGNEE.

An assignee for creditors is entitled to a reasonable compensation, considering the time and talent required and the character of the service performed, and the amount is to be determined by the court, under section 3180, Hill's Ann. Laws, which authorizes the allowance to an assignee of such commissions as may be considered just.—*Re Assignment of Woodall*, 382.

INSTRUCTIONS TO JURIES.

Instruction on Improbability of Crime. See TRIAL, 8, 9.

Degrees of Proof—Civil and Criminal Cases. See TRIAL, 10.

Using Unusual References by way of Illustration. See TRIAL, 5.

Entire Instruction Must be Considered. See TRIAL, 4.

Concerning the Use of a Deadly Weapon. See CRIMINAL LAW, 30.

When Jury May Consider Evidence of Threats. See CRIMINAL LAW, 29.

INSULATION OF ELECTRIC WIRES.

Effect of Imperfect Insulation—Resulting Injuries. See ELECTRICITY, 3, 5.

INSURANCE.

AGREEMENT TO INSURE—PRESUMPTION AS TO FORM OF POLICY.

1. Where nothing is stipulated in a preliminary agreement to insure so far as it respects the kind of policy to be issued, the law presumes that the parties contemplated the policy ordinarily employed by the company to cover property of the kind designated in the agreement, and this whether insured sues in equity for specific performance of the agreement and for damages in pursuance thereof, or at law directly on the agreement for damages for a breach thereof in neglecting to issue the policy.—*Sprout v. Western Assurance Company*, 98.

2. The policy which an insurance company undertakes and agrees to issue becomes a controlling factor in determining the relief to which the assured is entitled in an action on an oral preliminary contract for the issuance of such policy which was not carried out.—*Sprout v. Western Assurance Company*, 98.

INCUMBRANCES—WAIVER OF CONDITIONS OF POLICY.

3. Where, in the course of the negotiation of a preliminary agreement for the issuance of a policy, no inquiry is made touching incumbrances, and no intimation is given applicant that they would affect the insurance, the denial of the agreement and the withholding of the policy by the company waives a condition in the policy against incumbrances.—*Sprout v. Western Assurance Co.*, 98.

WAIVER OF PROOFS OF LOSS.

4. A denial of an oral contract to insure followed by a refusal to deliver a policy, is a waiver of any condition or rule requiring proofs of loss.—*Sprout v. Western Assurance Company*, 98.

INSURANCE—LEGALITY OF ARBITRATION.

5. The valued policy act of this state (Laws 1893, p. 133), which provides that "in case there is a partial destruction of the property insured, no greater amount shall be collected than the damages sustained," does not affect the right of the parties to arbitrate a partial loss, either on a building or on personal property.—*Stemmer v. Scottish Insurance Company*, 65.

MEANING OF WORDS USED IN THE INSURANCE STATUTES.

6. The words "full amount of such loss," as used in section 3577 of Hill's Ann. Laws, and the expression "damages sustained" found in the fire insurance act of 1893, unquestionably mean indemnity.—*Stemmer v. Scottish Insurance Company*, 65.

INTEREST.

ON UNLIQUIDATED CLAIMS.

1. Under the Oregon statute (Hill's Ann. Laws, § 3387) there is no interest on unliquidated claims.—*Smith v. Turner*, 379.

ON COUNTERCLAIM.

2. A counterclaim for unliquidated damages in an action on a note does not cut off the running of interest on the note from the time the claim accrued, but only from the verdict, except where the damages are previously liquidated by the confession or default of plaintiff.—*Smith v. Turner*, 379.

INTEREST—CONCLUDED.

INTEREST ON AN AWARD.

3. Where an insured sues to set aside an award, he should not be allowed interest until the decree is entered, for, having rejected the award, there was nothing on which to compute interest.—*Stemmer v. Scottish Insurance Co.*, 66.

INTERIOR DEPARTMENT.

Control of Over Leased Indian Lands. See INDIANS.

IRRIGATION. Same as WATERS.

JEOPARDY. See CRIMINAL LAW, 8, 9.

JOINT AND SEVERAL JUDGMENT. See JUDGMENTS, 8.

JOINT TENANCY in Crop. See LANDLORD AND TENANT, 2.

JUDGMENTS. See also DECREES.

PAYMENT BY TURNING OVER AN ACCOUNT.

1. It is immaterial that a judgment debtor does not offer an account as part payment of the judgment if it is taken and accepted by the creditor from the sheriff as such payment, and the debtor subsequently acquiesces therein.—*Barr v. Rader*, 375.

FALSE RETURN OF SUMMONS—EQUITY.

2. A judgment obtained against one without service on or appearance by him, but through a false return of service on him, may be relieved against in equity.—*Huntington v. Crouler*, 408.

JOINT AND SEVERAL JUDGMENT.

3. In an action against several defendants on an alleged joint demand, there cannot be a joint judgment against some of them for part of the claim and against others or another for another part. Under section 98, Hill's Ann. Laws, there cannot be a joinder of distinct causes of action against parties severally liable.—*Hayden v. Pearce*, 89.

INFANTS—JUDGMENTS—COLLATERAL ATTACK.

4. Fictitious proceedings in the county court, by which the land of an infant is transferred to a third person who had previously executed a mortgage thereon in pursuance of a scheme to mortgage the infant's land, are not entitled to the force and effect of a judgment, and may be collaterally attacked in a suit to foreclose the mortgage.—*Conklin v. La Dow*, 354.

APPEAL FROM ONLY PART OF A JUDGMENT.

5. Since a judgment at law is not severable, an appeal cannot be taken from part of it. The dissatisfied party must appeal from the entire judgment, and then the Supreme Court may review any part of the proceedings, either final or interlocutory.—*Farmer's Bank v. Key*, 443.

JURISDICTION.

Of County Court Must Appear on Appeal Record. See APPEAL, 3.

Of Equity to Enjoin Judgment Based on False Return. See EQUITY, 1.

Of Equity Where There is a Remedy at Law. See EQUITY, 2, 3.

Of Equity in Preventing Multiplicity of Actions. See EQUITY, 2.

Of Equity in Foreclosing Bond for a Deed—Possession. See EQUITY, 4.

JURY TRIAL.

Disqualification of Jurors for Bias. See TRIAL, 23.

Misconduct of Jurors—New Trial. See TRIAL, 24, 25.

Surprise—Waiver of Resulting Rights. See TRIAL, 23.

JUSTICE OF THE PEACE.

APPEAL FROM JUSTICE'S COURT—NEW UNDERTAKING.

Where an appellant filed with the justice of the peace in due time his undertaking on appeal sufficient in form, but by a mistake of the attorney one of the sureties did not appear and justify after being excepted to, and an application is made to the circuit court for leave to file a new undertaking, it should be granted and the case held for trial, under Hill's Ann. Laws, § 2129.—*Gobbi v. Tefrano*, 26.

LACHES As Affecting Right of Rescission. See VENDOR AND PURCHASER, 6.

LANDLORD AND TENANT.

CONSTRUCTION OF CONTRACT—LEASE.

1. A contract by which one person is to rent certain premises, advance and pay the rent therefor, furnish necessary grain to seed the same, advance the money for harvesting the crops and the sacks for the same, and a second person is to cultivate the land and care for the crop produced until ready for harvesting, furnish the necessary assistance in harvesting, and out of the proceeds arising therefrom repay the former all money advanced for harvesting, sacking and marketing the crop and for rent of the premises, and also a debt due from him to such former person, entitles the husbandman to any surplus remaining after making such payments, although the contract is silent in regard thereto. Considered in its entirety the contract is one of leasing.—*Hargett v. Beardale*, 301.

TENANCY IN COMMON.

2. A tenancy in common between the landlord and tenant in the crop produced by the latter is never created where there is a cash rental.—*Hargett v. Beardale*, 301.

LARCENY.

Coöperation of Owner in the Theft. See CRIMINAL LAW, 27.

LATIN MAXIMS.

Res Ipsa Loquitur. } —*Perham v. Portland Electric Co.*, at pp. 474, 475.
Res Inter Allos.
Ejusdem Generis.

LEASE.

Contract Construed to be a Lease. See LANDLORD AND TENANT, 1.

Indian Lands—Cancellation by Secretary of Interior. See UNITED STATES.

LIMIT OF COUNTY INDEBTEDNESS. See COUNTIES.

LOCATION OF COUNTY ROADS. See HIGHWAYS.

MANDAMUS.

APPEAL FROM AN EXECUTED ORDER.

1. An appeal from a peremptory writ of mandamus will be dismissed, where it was not taken until after compliance with the terms of the writ.—*Jacksonville School District v. Crowell*, 11.

CONTENTS OF WRIT.

2. A writ of mandamus must itself point out the acts required to be done, and the person against whom it is directed cannot be required to look beyond the language of the writ to ascertain such acts.—*Sears v. Kincaid*, 215.

DUTY OF SECRETARY OF STATE—AUSTRALIAN BALLOT LAW.

3. Under section 45 of the election law of this state, commonly known as the Australian Ballot Law (Laws, 1891, p. 22), the secretary of state is required to certify to the names of candidates, and to the other matters contained in the several certificates of nominees whose names are required by law to be placed on the official ballot, and mandamus will not compel him to do more, as, for example, to certify that a particular candidate was nominated by a certain party.—*Sears v. Kincaid*, 215.

MAXIMS. See also LATIN MAXIMS.

COMING INTO COURT WITH CLEAN HANDS.

"He who comes into a court of equity must come with clean hands".—*Conklin v. La Dow*, 355.

MEANDER LINES.

Government Survey—Boundary of Patent. See PUBLIC LANDS, 2.

MEMORANDA.

Use of by Witness—Refreshing Memory. See WITNESSES, 9.

MILEAGE.

Of Witnesses Attending Without Subpoena—Costs. See COSTS, 2.

MISCONDUCT.

Separation of Jury—Drinking Liquor. See TRIAL, 24, 25.

Improper Speech to Jury by Counsel. See CRIMINAL LAW, 4.

MISJOINDER OF PARTIES.

When May be Urged on Writ of Review. See WRIT OF REVIEW, 1.

MISREPRESENTATION. See VENDOR AND PURCHASER, 1.

MORTGAGES. See also CHATTEL MORTGAGES.

ASSUMING PAYMENT OF MORTGAGE.

1. One who accepts a conveyance of land in which it is provided that the grantee shall assume the payment of a lien on such land makes the debt his own as though he had originally executed it.—*Farmers' Nat. Bank v. Gates*, 388.

MORTGAGE FORECLOSURE—PARAMOUNT TITLE.

2. Where the owner of an upland bordering on a body of water mortgages such upland to one person and afterwards the land under the water to another, the owner of the first mortgage may properly in a foreclosure proceeding determine the extent and position of his rights as against the holder of the second mortgage. Such an adjudication will not be a violation of the rule against litigating questions of paramount title in mortgage foreclosures.—*Farmers' National Bank v. Gates*, 388.

3. The rule that a title adverse or paramount to that of the mortgagor cannot be litigated in a foreclosure suit does not apply to a suit to foreclose a mortgage on land of an infant executed by a third person to whom the land was afterwards conveyed in pursuance of a scheme to encumber the infant's property.—*Conklin v. La Dow*, 354.

GUARDIAN AND WARD—MORTGAGE.

4. A guardian who has no power under the statute to mortgage the land of his ward cannot indirectly encumber it by making a sham sale to a third party who executed a mortgage thereon.—*Conklin v. La Dow*, 355.

MORTGAGE FORECLOSURE—EQUITY MAXIM.

5. Under the rule that he who comes into a court of equity must come with clean hands, the fact that a mortgage on a minor's interest in a tract of land is void against him because made without authority by a guardian does not deprive the mortgagee of all rights, but only of any lien on the interest of the infant. The other mortgagors and subsequent purchasers must pay or take the consequences.—*Conklin v. La Dow*, 355.

STRICT FORECLOSURE OF EQUITABLE INTEREST.

6. Section 414 of Hill's Ann. Laws, providing for sale and redemption of mortgaged realty, has reference only to the foreclosure of liens that are security for debts, and does not apply to a suit to bar the equitable interest of the grantee in a bond for a deed.—*Security Savings Company v. Mackenzie*, 200.

MOTION.

For Verdict is a Demurrer to the Evidence. See TRIAL, 20.

For Judgment After Overruling Demurrer. See TRIAL, 22.

To Set Aside Indictment—When Must be Made. See CRIM. LAW, 12.

To Dismiss Appeal—Sufficiency. See APPEAL, 35.

To Dismiss Appeal—Failure to File Briefs. See APPEAL, 16, 17.

MULTIPLICITY OF ACTIONS.

Remedy at Law—Jurisdiction of Equity. See EQUITY, 2.

MUNICIPAL CORPORATIONS.

CONSTRUCTION OF PAVING CONTRACT.

1. Under an ordinance providing that a paving contractor shall give a bond to the city in an amount equal to the contract price of the improvement, conditioned that he shall perform the contract according to specifications, and also give a bond equal to twenty-five per cent. of the contract price, conditioned that for the period of five years from the date of its completion he will keep the pavement in repair, by immediately, upon proper notice, repairing at his own cost and expense any injuries or worn out places or other defects due to traffic, or on account of disintegration or decay, or in any manner attributable to defective materials or workmanship, a bond given by a contractor under the latter part of the ordinance is an undertaking to maintain the pavement in repair for a designated period of time, and not a guaranty that the work will be done and the materials furnished according to the contract.—*Portland v. Bituminous Paving Company*, 307.

MAINTENANCE—PAVING CONTRACT—ULTRA VIRES.

2. Where a city is authorized to repair its streets, and, if so declared by ordinance, assess the cost against the adjacent property, the repairs contemplated are those whose present necessity exists in the opinion of the council, and there cannot be inserted in a contract for street paving, to be paid for by special assessment, a provision requiring the contractor to keep the street in repair for a period of years.—*Portland v. Bituminous Paving Company*, 307.

STREET ASSESSMENTS FOR ILLEGAL CONTRACT.

3. An assessment against property to meet expenses of street repairs required by an illegal contract is void.—*Portland v. Bituminous Paving Company*, 307.

POWER OF CITY TO ACCEPT BOND FOR MAINTENANCE OF STREETS.

4. A bond to a city by a street contractor which constitutes an independent undertaking by the latter to keep the street and pavement in repair for a given number of years, and which covers in effect all injuries liable to arise from whatsoever source, is not authorized by a statutory power to take security by bonds for the performance of contracts.—*Portland v. Bituminous Paving Co.*, 308.

BOND FOUNDED ON ULTRA VIRES CONTRACT.

5. A bond given for the performance of a contract with a city is void and incapable of enforcement, where the contract is *ultra vires*, and would cause an illegal application of the city's funds.—*Portland v. Bituminous Paving Co.*, 308.

RULE FOR ESTOPPEL AGAINST CITIES.

6. A municipality will be estopped to enforce the performance of a contract under the same or like conditions that an individual will be estopped to proceed against it.—*Portland v. Bituminous Paving Company*, 308.

VOLUNTARY BOND—ULTRA VIRES.

7. The fact that the bond is voluntary and founded upon a valid consideration will not enable a city to enforce a bond by a street contractor to repair a street for a period of years, when the contract is entirely beyond the general scope of the powers of the city, even if it has been fully executed by the city.—*Portland v. Bituminous Paving Company*, 308.

MUNICIPAL COURT—STATUTORY CONSTRUCTION.

8. A provision in a city charter limiting punishment by imprisonment to ninety days does not affect the right of the municipal judge to inflict a fine, the working out of which under the general statutes will keep one in confinement longer than the prescribed limit; since in the latter case the defendant is only paying a fine, while in the other case he is being imprisoned as a punishment.—*Ex parte McGee*, 165.

MURDER.

Consideration of Threats—Presumption From Use of Deadly Weapon—Expulsion of Trespassers. See CRIMINAL LAW, 20, 30, 31.

MUTUALITY.

Effect of Signing Contract. See CONTRACTS, 5.

NEGLIGENCE.

NEGLECT IN PLACING ELECTRIC WIRES.

1. The owner of electric wires carrying a dangerous current is chargeable with negligence in stringing them over a bridge so near the top of it that it is impossible to make repairs on the bridge without coming in contact with them.—*Perham v. Portland Electric Company*, 451.

NEGLIGENCE—CONCLUDED.

2. Placing electric wires known to be dangerous at a place where others are lawfully entitled to be constitutes negligence.—*Perham v. Portland Electric Co.*, 451.

3. An electric company, by consent of a bridge owner, placed over the bridge two wires two feet apart. It did not inform the owner that, notwithstanding the insulation of the wires, it was dangerous to touch both at once, though it knew that persons while repairing the bridge would be near the wires. Decedent, having no expert knowledge of electricity, was employed by the owner to repair the bridge. He touched the wires when they were dead, but mistakenly supposed they were alive, and harmless because of their insulation. Later in the day a current was turned on without notice to him, and he touched both wires at once, and was killed. By some inconvenience to himself, he could have avoided touching them. Held, that the company was liable.—*Perham v. Portland Electric Co.*, 451.

QUESTION FOR JURY—CARE TO AVOID INJURY.

4. Whether a person exercised such care to prevent injury from electric wires as an ordinarily careful and prudent person usually exercises under similar circumstances is a question for the jury.—*Perham v. Portland Electric Co.*, 451.

NEWLY DISCOVERED EVIDENCE. See NEW TRIAL, 3.

NEW TRIAL.

DISCRETION OF COURT.

1. Motion to set aside verdicts and for new trials for insufficiency of the evidence are discretionary and the orders thereon are not appealable.—*State v. Gardner*, 150.

SURPRISE.

2. Where a party did not move for a continuance at the time an alleged surprise occurred, but waited until after a verdict, he waived the objection.—*State v. Gardner*, 150.

NEWLY DISCOVERED EVIDENCE.

3. A new trial will not be granted on the ground of newly discovered evidence where such evidence merely tends to impeach the adversary's witnesses.—*State v. Gardner*, 150.

NON OBSTANTE VERDICTO.

Motion for Judgment After Overruling a Demurrer. See TRIAL, 23.

NONRESIDENCE.

Right of Nonresident to Benefit of Exemption Statutes. See STATUTES, 3.

Place of Mailing Summons to Nonresident. See SUMMONS, 3.

NONSUIT.

WHEN NONSUIT SHOULD BE REFUSED.

1. The only question for the consideration of the court on a motion for a nonsuit is whether there is any evidence from which the jury can reasonably conclude that the facts sought to be proved are established, and in determining such question it must assume as true every fact which the jury could properly find from the evidence.—*Barr v. Rader*, 375.

MOTION FOR VERDICT IS A DEMURRER TO THE EVIDENCE.

2. A request to direct a verdict is substantially a demurrer to the sufficiency of the evidence and it should be considered as a motion for a nonsuit.—*First National Bank v. Fire Association*, 123.

NOTICE.

To Owner in Condemnation Proceedings. See HIGHWAYS, 6, 7.

Of Presenting Petition—Showing as to Venue. See HIGHWAYS, 9.

To Cashier as Notice to his Bank. See BANKS.

NOTICE OF APPEAL.

Sufficiency of Notice—Incomplete Description. See APPEAL, 34.

OFFICERS.

SCHOOLS—ACTS OF DE FACTO DIRECTOR.

1. A school director, although he has removed from the district, will be considered a *de facto* officer so far as the rights of third persons are concerned, where he continued to act as a director and exercised the duties pertaining to the office. — *Graham v. School District*, 263.

DUTY OF SECRETARY OF STATE IN CERTIFYING NOMINATIONS.

2. Session Laws, 1891, p. 22, requires the Secretary of State, before election, to arrange all the names and other information concerning candidates contained in the certificates of nomination filed with him and accepted by the nominees, and to certify to and file the same, and transmit to the several county clerks and post in his office a duplicate thereof. *Held*, that the act requires him only to certify to the names of the candidates, and to the other matters contained in the sworn certificates of nomination, required by law to be placed on the official ballot, but not that the persons so named are in fact the nominees of any party, and he cannot pass upon the validity of such nominations, or inquire into the regularity of the conventions by which they have been made; and mandamus will therefore not lie to compel him to certify to the nomination of a candidate, and to transmit to the several county clerks and post in his office a duplicate of such certificate. — *Sears v. Kincaid*, 215.

EXPERT EXAMINATION OF BOOKS OF PUBLIC OFFICERS.

3. Warrants issued for posting up public records that are behind and for exporting books of the county officers are necessary expenses of conducting a county imposed by law. — *Municipal Security Company v. Baker County*, 339.

OPINION EVIDENCE.

Where Skilled Witnesses May Express Opinions on Ordinary Subjects—Exceptions to General Rule—Subjects of Expert Testimony. See EVIDENCE, 1, 9.

OREGON CASES Applied, Approved, Cited, Distinguished, Followed and Overruled in this Volume.

Balsley v. Balsley, 15 Or. 183, applied, 149.
 Ball v. Doud, 26 Or. 14, approved, 301, 304, 307.
 Bank of Winnemucca v. Mullaney, 29 Or. 268, cited, 375.
 Barbre v. Goodale, 28 Or. 455, cited, 353.
 Becker v. Malheur County, 24 Or. 217, followed, 144.
 Berry v. Charlton, 10 Or. 362, followed, 373.
 Blewley v. Graves, 17 Or. 274, cited, 232; applied, 270.
 Blyeu v. Smith, 18 Or. 335, applied, 239.
 Blingham v. Kern, 18 Or. 199, approved, 298.
 Booth v. Moody, 30 Or. 222, approved, 248, 304, 307.
 Bowen v. State, 1 Or. 271, followed, 152.
 Branson v. Gee, 25 Or. 462, cited, 226.
 Bunneman v. Wagner, 16 Or. 433, cited, 317.
 Burnett v. Markley, 23 Or. 436, approved, 338.
 Bush v. Mitchell, 28 Or. 92, applied, 443.

California Land Co. v. Gowen (Or.) 48 Fed. 771, approved, 181, 206.
 Cameron v. Wasco County, 27 Or. 318, applied, 270.
 Carlson v. Dixon, 12 Or. 148, cited, 318.
 Carlson v. Oregon Short Line Ry. Co., 21 Or. 450, cited, 463, 467, 480.
 City of Portland v. Bituminous Paving Co., 33 Or. 307, cited, 353.
 Close v. Close, 28 Or. 108, applied, 422.
 Coffin v. Hutchinson, 22 Or. 554, followed, 173.
 Connor v. Clark, 30 Or. 382, applied, 504.
 Cook v. Croisan, 25 Or. 475, cited, 446.
 Craft v. Dalles City, 21 Or. 53, followed, 110.
 Crawford v. Linn County, 11 Or. 484 cited, 148.
 Crawford v. Roberts, 8 Or. 325, cited, 446.
 Crawford v. Wist, 26 Or. 506, applied, 370.
 Curtis v. La Grande Water Co., 20 Or. 34, cited, 517.

Daly v. Larsen, 29 Or. 535, followed, 391.
 David v. Waters, 11 Or. 448, approved, 298.
 Day v. Holland, 15 Or. 464, applied, 154.
 Dayton v. Board of Equalization, 38 Or. 181, approved, 202.
 Dray v. Dray, 21 Or. 56, cited, 493.

OREGON CASES—CONTINUED.

Evans v. Christian, 4 Or. 375, cited, 208.

Evarts v. Steger, 5 Or. 147, approved, 301, 304.

Fain v. Smith, 14 Or. 82, cited, 437.

Farmer's Loan Co. v. Oregon Pacific R. R. Co., 31 Or. 237, cited, 531.

Fenton v. Scott, 17 Or. 180, approved, 333.

First National Bank v. Fire Association, 33 Or. 172, distinguished, 194.

Fisher v. Oregon Short Line Ry. Co., 22 Or. 633, cited, 172.

Flint v. Phipps, 16 Or. 437, cited, 430.

Glaze v. Whitley, 5 Or. 166, cited, 48.

Godfrey v. Douglas County, 28 Or. 446, followed, 144.

Grant County v. Lake County, 17 Or. 453, approved, 338.

Guille v. Wong Fook, 13 Or. 577, followed, 22.

Hamlin v. Kassafer, 15 Or. 456, applied, 263.

Handley v. Jackson, 31 Or. 552, cited, 413.

Hardwick v. State Insurance Co., 20 Or. p. 557, applied, 99.

Hartman v. Young, 17 Or. 150, approved, 333.

Hawley v. Dawson, 16 Or. 344, cited, 66.

Hawley v. Dawson, 16 Or. 344, followed, 379.

Hawley v. Jette, 10 Or. 31, cited, 531.

Herbert v. Dufur, 23 Or. 462, approved, 376.

Hoffmire v. Martin, 29 Or. 240, cited, 442.

Holland v. Brown, 35 Fed. 43 (Or.), followed, 464.

Hosford v. Logus, 13 Or. 130, cited, 29.

Houghton v. Beck, 9 Or. 325, approved, 236.

House v. Jackson, 24 Or. 89, applied, 221.

Hughes v. Clemens, 28 Or. 440, cited, 29.

Hughes v. Holman, 23 Or. 481, approved, 333.

Jensen v. Foss, 24 Or. 158, followed, 303.

Johnston v. Or. Short Line Ry. Co., 23 Or. 94, followed, 173.

Judkins v. Taffe, 21 Or. 89, applied, 563.

Kelly v. Highfield, 15 Or. 227, approved, 125.

Kirkwood v. Washington County, 32 Or. 563, approved, 201.

Kitcherside v. Myers, 10 Or. 21, approved, 333.

Knahtla v. Oregon Short Line Ry. Co., 21 Or. 130, applied, 282.

Koshland v. Hartford Insurance Co., 31 Or. 402, applied, 99.

Koshland v. Home Insurance Co., 31 Or. 321, applied, 99.

Krewson v. Purdom, 15 Or. 539, distinguished, 324.

Kumli v. Southern Pacific Co., 21 Or. 505, cited, 556.

Ladd v. Foster, 31 Fed. 827 (Or.), cited, 464.

Ladd v. Mason, 10 Or. 308, applied, 561.

Langford v. Jones, 18 Or. 308, followed, 110, 363.

Latimer v. Tillamook County, 22 Or. 291, applied, 270.

Lung Chung v. Northern Pacific R. R. Co., 19 Fed. 254 (Or.), cited, 464.

McCullough's Estate, 31 Or. 88, cited, 385.

McQuaid v. Portland R. R. Co., 19 Or. 535, applied, 422.

Mendenhall v. Harrisburg Water Co., 27 Or. 38, explained, 395.

Miles v. Miles, 6 Or. 266, approved, 338.

Minter v. Durham, 13 Or. 471, explained, 292.

Moody v. Richards, 29 Or. 282, followed, 391.

Moser v. Jenkins, 5 Or. 448, followed, 292.

Muldrick v. Galbraith, 31 Or. 88, cited, 385.

Murray v. Murray, 8 Or. 17, followed, 370.

Neppach v. Jones, 28 Or. 286, applied, 422.

Nickum v. Gaston, 24 Or. 380, followed, 368.

Northern Pacific Terminal Co. v. City of Portland, 14 Or. 24, distinguished, 226.

Nutt v. Southern Pacific Co., 25 Or. 291, cited, 172.

Odell v. Godfrey, 13 Or. 466, cited, 29.

O'Hara v. Parker, 27 Or. 157, approved, 338.

Oregon and California R. R. Co. v. Croisan, 22 Or. 393, cited, 136, 142.

Oregon and California R. R. Co. v. Lane County, 23 Or. 386, followed, 144.

OREGON CASES—CONTINUED.

Oregon Mortgage Savings Bank v. Jordan, 16 Or. 113, followed, 144.
Oregon Pottery Co. v. Kern, 30 Or. 324 followed, 324.
Oregon The, 73 Fed. 846 (Or.), followed, 463.

Parker v. Metzger, 12 Or. 407, approved, 80.
Parker v. Newitt, 18 Or. 274, cited, 486.
Pendleton v. Saunders, 19 Or. 9, cited, 183.
Pengra v. Wheeler, 24 Or. 532, cited, 66; followed, 319.
Portland Lumbering Co. v. City of East Portland, 18 Or. 21, cited, 55.
Portland v. Bituminous Paving Co. 33 Or. 307, cited, 486.
Portland Construction Co. v. O'Neill, 24 Or. 54, applied, 66.
Powell v. Dayton, etc., R. R. Co. 14 Or. 22, followed, 283.

Ramp v. Marion County, 24 Or. 461, followed, 144.
Ramsey v. Pettengill, 14 Or. 207, cited, 208.
Re McCullough's Estate, 31 Or. 86, cited, 385.
Reynolds v. Jackson County, 33 Or. 422, applied, 372.
Roberts v. Parrish, 17 Or. 583, followed, 193.
Rosendorf v. Baker, 8 Or. 240, followed, 578.

Salem Water Co. v. City of Salem, 5 Or. 20, applied, 339.
Salomon v. Cress, 22 Or. 177, followed 384.
Schaefer v. Steln, 20 Or. 147, followed, 173.
Schlott v. Phillippl, 3 Or. 484, cited, 204.
Sheppard v. Yocum, 10 Or. 403, applied, 33, 43; distinguished, 11.
Sheppard v. Yocum, 11 Or. 234, cited, 446.
Shmit v. Day, 27 Or. 110, followed, 183.
Singer Manufacturing Co. v. Graham, 8 Or. 17, followed, 573.
Sloper v. Carey, 9 Or. 511, approved, 239.
Stanley v. Smith, 15 Or. 505, followed, 110.
State v. Abrams, 11 Or. 160, followed, 110, 510.
State v. Anderson, 10 Or. 448, applied, 110.
State v. Bacon, 13 Or. 133, cited, 37, 123.
State v. Becker, 12 Or. 318, followed, 152.
State v. Brown, 28 Or. 147, cited, 536.
State v. Bruce, 5 Or. 68, cited, 508.
State v. Carver, 22 Or. 602, cited, 111.
State v. Clements, 15 Or. 27, followed, 152.
State v. Dodson, 4 Or. 64, cited, 127.
State v. Doty, 5 Or. 491, cited, 508.
State v. Drake, 11 Or. 396, followed, 152.
State v. Hillsworth, 30 Or. 145, cited, 33.
State v. Fitzhugh, 2 Or. 227, followed, 152.
State v. Foot You, 24 Or. 61, approved, 150.
State v. Gallo, 18 Or. 423, followed, 110.
State v. Hansen, 25 Or. 391, applied, 110.
State v. Hatcher, 29 Or. 300, applied, 324.
State v. Horne, 20 Or. 485, applied, 506.
State v. Howe, 27 Or. 138, distinguished, 570.
State v. Jarvis, 18 Or. 300, cited, 508.
State v. Kirk, 10 Or. 505, cited, 533.
State v. Lawrence, 12 Or. 207, cited, 564.
State v. Lurch, 12 Or. 99, distinguished, 110.
State v. Mack, 20 Or. 230, followed, 422.
State v. Mackey, 12 Or. 154, followed, 152.
State v. Magone, 32 Or. 206, approved, 83.
State v. McCormack, 8 Or. 230, distinguished, 570.
State v. McDonald, 8 Or. 113, distinguished, 33; followed, 162.
State v. Moran, 15 Or. 262, cited, 533.
State v. Pomeroy, 30 Or. 16, applied, 173.
State v. Pool, 20 Or. 150, applied, 483.
State v. Porter, 32 Or. 135, cited, 127.
State v. Roberts, 15 Or. 187, followed, 152.
State v. Sargent, 32 Or. 110, cited, 508.
State v. Saunders, 14 Or. 300, distinguished, 110.
State v. Sheppard, 15 Or. 508, applied, 165.
State v. Steeves, 29 Or. 85, cited, 36, 333; followed, 110;
State v. Tom Louey, 11 Or. 326, followed, 510.
State v. Wilson, 6 Or. 428, followed, 152.
Swanson v. Leavens, 27 Or. 561, applied, 422.
Surles v. Sweeney, 11 Or. 21, followed, 282.
Suksdorf v. Bigham, 13 Or. 308, cited, 1.

OREGON CASES—CONCLUDED.

Tatum v. Massie, 29 Or. 140, cited, 394.
 Taylor v. Miles, 19 Or. 530, cited, 488.
 Territory v. Latshaw, 1 Or. 148, applied, 150.
 The Oregon, 73 Fed. 846 (Or.), followed, 463.
 Tillamook Dairy Association v. Schermerhorn, 31 Or. 308, cited, 91.
 Towns v. Klamath County, 38 Or. 225 followed, 260, 261.
 Trutch v. Bunnell, 11 Or. 58, cited, 359.
 Tucker v. Constable, 16 Or. 407, approved, 125.

Van Bibber v. Plunkett, 26 Or. 582, applied, 172, 375.
 Van Voorhies v. Taylor, 24 Or. 247, followed, 448.

Wolf v. Smith, 8 Or. 73, cited, 418.
 Walker v. Goldsmith, 7 Or. 162, approved, 388.
 Wallace v. Suburban Railway Co., 28 Or. 174, applied, 173, 375.
 Wallowa National Bank v. Riley, 29 Or. 286, followed, 373.
 Watson v. Smith, 7 Or. 448, cited, 159.
 Weiner v. Lee Shing, 12 Or. 276, approved, 298.
 Willamette Falls Canal Co. v. Gordon, 6 Or. at p. 179, applied, 221.
 Woodruff v. Douglas County, 17 Or. 314, distinguished, 225.
 Woods v. Courtney, 18 Or. 121, followed, 193.
 Woodward v. Oregon Railway and Navigation Co., 18 Or. 289, applied, 282.
 Wormington v. Pierce, 22 Or. 606, approved, 344.

"OTHER CAUSES." See WORDS AND PHRASES.

OVERRULED CASES. See OREGON CASES.

"OWNER." See WORDS AND PHRASES.

PARAMOUNT TITLE.

Determination of in Mortgage Foreclosures. See MORTGAGES, 2, 3.

PARTNERSHIP.

EVIDENCE OF PARTNERSHIP.

1. Testimony that witness had left money on deposit with a firm on the faith and credit of defendant is inadmissible to prove defendant's membership in the firm.—*Farmer's Bank v. Saling*, 395.

2. To prove a person's membership in a firm, letterheads and sacks on which his name is printed as a firm member, used by such firm in its business at a date subsequent to the time of incurring the liability sued on, are admissible in corroboration of other independent evidence on that issue.—*Farmer's Bank v. Saling*, 395.

3. On an issue whether one of the defendants was a member of a firm which signed certain notes, it was competent to offer in evidence the notes and letters dated some months later, but signed in the same handwriting and written on letterheads having the name of the defendant as one of the partners. The documents, being signed by the same person, are *prima facie* evidence that the firm whose name was signed to the note was the same firm whose names appear on the letterhead.—*Farmer's Bank v. Saling*, 395.

4. On an issue of the membership of a firm to which a loan had been made, there being two firms of the same name, testimony of the lender as to which one of the firms he understood he was lending the money to is admissible.—*Farmer's Bank v. Saling*, 394.

5. To prove defendant's membership in a firm, testimony that witnesses understood or believed defendant to be a member is admissible, where such witnesses state the facts from which they derive their understanding or belief, and such facts are proper for the consideration of the jury.—*Farmer's Bank v. Saling*, 394.

PAYMENT.

EXECUTION—PAYMENT.

It is immaterial that a judgment debtor does not offer an account as part payment of the execution, if it is taken and accepted by the creditor from the sheriff as such payment, and the debtor subsequently acquiesces therein.—*Barr v. Rader*, 375.

33 OR.—41.

PERSONAL PROPERTY. See PROPERTY.

PHRASES. Same as WORDS AND PHRASES.

PHYSICIANS AND SURGEONS.

COURTS—PHYSICIANS.

The proceedings of a board of medical examiners in refusing a license to practice to one applying therefor cannot, after such board has become *functus officio*, be revised by the courts where no proceeding was taken at the time to compel the board by mandamus to act.—*Miller v. Medical Board*, 5.

PLEADING.

DECREE—ISSUES MADE BY THE PLEADINGS.

1. A decree which charges the plaintiff's maintenance upon land conveyed by her in consideration of future support is within the issue made by the pleadings where it is alleged that to secure a home and care the plaintiff transferred her property as a gift, and the reply denies that the defendant agreed to clothe and support the plaintiff in consideration of the title received.—*Patton v. Nixon*, 156.

ESTOPPEL TO DENY EQUITABLE JURISDICTION.

2. An objection in an equity suit that plaintiff has an adequate remedy at law cannot be raised by a defendant who has by his own answer asked equitable relief.—*Municipal Security Company v. Baker County*, 338.

CONTRACT OR TORT.

3. A complaint averring the delivery of merchandise by plaintiff to defendants, under an agreement that defendants should sell the same, and account for the proceeds, less expenses and a certain commission, but the defendant "wrongfully and unlawfully retained and converted to their own use" an excess over the agreed commission, declares upon a contract rather than a tort.—*Hutchcroft v. Herren*, 1.

NEGIGENCE—CONSTRUCTION OF PLEADINGS.

4. A complaint alleging that defendants operated an engine on premises adjoining plaintiff's; that in so operating it they negligently took the fire from it and placed the same on the ground in the straw and stubble, and thereby, through negligence, permitted the fire so taken from the engine to spread and burn over said straw and stubble, and into plaintiff's field, and thereby, through defendant's negligence, the fire destroyed property on plaintiff's premises, charges only negligence in putting the fire in an improper place, and not negligence in failing to extinguish it after it had been taken from the engine.—*Lieutallen v. Mosgrove*, 282.

ALLEGATA ET PROBATA.

5. An allegation that fire was negligently taken from defendant's engine used for threshing and placed upon the ground in and about the stubble, from which it communicated to and consumed plaintiff's property is not sustained by evidence that defendants were negligent in not properly extinguishing the fire after it had been properly taken from the engine. WOLVERTON, J., dissents.—*Lieutallen v. Mosgrove*, 282.

REPLEVIN—NECESSARY ALLEGATION OF COMPLAINT.

6. A complaint in an action of claim and delivery must show that plaintiff was entitled to the possession of the chattels when the action was commenced.—*Kimball v. Redfield*, 292.

7. An allegation in a replevin complaint that at a certain time before the commencement of the action plaintiff was the owner and entitled to the immediate possession of the property in question, and that defendant "still unlawfully and wrongfully retains the possession thereof" does not show that plaintiff was entitled to the immediate possession when the action was commenced.—*Kimball v. Redfield*, 292.

AMENDING PLEADINGS—DISCRETION.

8. A liberal practice prevails in Oregon regarding amendments to pleadings: thus, where action was brought on a note dated 9 Sept., 1892, and it developed on the trial that the date should have been 9 Sept., 1893, it was proper to allow the complaint to be amended, it being apparent that the defendants had not been misled.—*Farmer's Bank v. Saling*, 365.

PLEADING.—CONCLUDED.

9. A cause based on a trust *ex maleficio*, rather than on an express trust, is stated by a complaint alleging the extreme age and mental infirmity of deceased; the fact of defendant, his wife, taking undue advantage of him while sick and incompetent to transact business, and obtaining from him a will and deeds of his property; her subsequent concealment from him of their execution; her later subsequent purpose of acquiring the property, with the present intention of ultimately withholding it from him and claiming it as her own, while she induced him to believe that it was necessary for her to have the legal title, to enable her to manage his property for him, together with a further statement of the manner of her subsequently acquiring legal title to his property, her refusal to account, and claim of ownership, though it is alleged that the last transfers of property to her were on her promise to him to manage it for him.—*Parrish v. Parrish*, 486.

“POINT” in Surveying. See WORDS AND PHRASES.

POLICE JUSTICE in Portland.

Power to Imprison for Nonpayment of Fine. See CRIMINAL LAW, 6.

POSSESSION.

Unnecessary to Support Foreclosure of Bond for Deed. See EQUITY, 4.

PRACTICE IN CIVIL CASES.

On Appeal From Order Distributing an Estate. See APPEAL, 1, 2, 3.

Motion for Judgment After General Demurrer. See APPEAL, 40.

Power of Court to Control Testimony. See TRIAL, 1.

Giving Special Charges to Jury. See TRIAL, 7.

Duty to Make Findings of Fact. See TRIAL, 11.

Examination and Cross-Examination of Witnesses. See TRIAL, 12, 13, 14.

Rule for Receiving Secondary Evidence. See TRIAL, 15.

Rule in Motions for Nonsuit. See TRIAL, 16, 17, 20.

Misconduct of Jury During Trial. See TRIAL, 21.

Proper Course When Taken by Surprise. See TRIAL, 26.

PRACTICE IN CRIMINAL CASES.

Improper Speech by District Attorney. See CRIMINAL LAW, 4.

Time to Object to Grand Jury. See CRIMINAL LAW, 10.

Time to Move to Quash Indictment. See CRIMINAL LAW, 12.

Duplicity in Indictments—Waiver. See CRIMINAL LAW, 14, 15, 16.

Rejecting Surplusage From Indictment After Verdict. See CRIM. LAW, 17.

Duty of District Attorney—Calling Witnesses. See CRIMINAL LAW, 19.

Cross-Examination of Defendant. See CRIMINAL LAW, 20.

When Charge on Insanity May be Given. See CRIMINAL LAW, 32.

Appeal by State From Verdict of Acquittal. See CRIMINAL LAW, 34.

PRACTICE IN SUPREME COURT.

Dismissal of Appeal for Non-compliance With Rules. See APPEAL, 16, 17.

Remanding Cause—Leave to Answer. See APPEAL, 42.

Judgment Roll Is Sufficient to Present Questions of Jurisdiction and Sufficiency of Complaint. See APPEAL, 12.

Error Cannot be Assigned on Reporter's Notes. See APPEAL, 13.

Place for Filing Transcript—Terms of Court. See APPEAL, 14.

Exception to a Series of Instructions in Gross. See APPEAL, 15.

PRESUMPTION.

TRIAL—PRESUMPTION OF INNOCENCE OF CRIME.

1. Where the defense to an action on an insurance policy is that the property was intentionally burned, it is proper to charge the jury that the person charged with the crime is presumably innocent, and that such presumption should be considered in arriving at a verdict. This is not a legal presumption, but rather a natural presumption of fact arising from the experience of mankind that probably people will not commit criminal acts.—*First National Bank v. Commercial Assurance Company*, 43.

PRESUMPTION—CONCLUDED.

AGREEMENT TO INSURE—FORM OF POLICY HAD IT ISSUED.

2. The parties to an oral preliminary contract for insurance are presumed in an action on such agreement to have contemplated the issuance of the usual and ordinary policy employed by the insurer to cover property of the kind and nature designated in the agreement.—*Sproul v. Western Assurance Co.*, 98.

PRESUMPTION OF REGULARITY IN ROAD PROCEEDINGS.

3. It will be presumed on appeal that persons appointed as viewers of a proposed road were "disinterested freeholders" as required by statute, when the contrary is not shown.—*Towns v. Klamath County*, 228.

DISPUTABLE PRESUMPTION.

4. Under the general presumption that official duty has been performed it will be supposed that a line appearing on a government map was by the official who surveyed the ground actually run as shown, but this may be disputed.—*Barnhart v. Ehrhart*, 275.

5. The presumption that a purchase of land by a husband in the name of his wife was an advance or settlement and not a trust, is disputable and may be overcome by evidence that such was not the intention of the parties nor the nature of the transaction relied upon.—*Parrish v. Parrish*, 486.

6. The presumption that a deed of absolute conveyance, unambiguous in its terms, expresses the intent of the parties at the time of its execution cannot prevail where fraud vitiates the conveyance itself.—*Parrish v. Parrish*, 486.

PRINCIPAL AND ACCESSORY.

Indictment of Accessory—Constitutional Right. See CRIMINAL LAW, 13.

PRINCIPAL AND AGENT. Same as AGENTS AND AGENCY.

PROBATE COURTS.

Writ to Review Allowance of a Claim. See COURTS, 8, 9.

"PROCEEDING" in Legal Parllance. See WORDS AND PHRASES.

PROCESS. Same as SUMMONS.

PROPERTY.

PERSONAL PROPERTY—BUILDING.

It is error to nonsuit plaintiff in an action for conversion of a building upon the ground that his evidence shows the building to be real and not personal property, where the defendant claims the building by virtue of a levy upon it as personal property under attachment, and the evidence merely shows that it was erected by one person upon land of another under an agreement giving the former the right to remove it.

PROOFS OF LOSS.

Requirement of is Waived by Denying Contract. See INSURANCE, 4.

PROSECUTING ATTORNEY. Same as DISTRICT ATTORNEY.

PROVINCE OF JURY. See TRIAL, 8, 9.

PUBLIC HIGHWAYS. Same as HIGHWAYS.

PUBLIC LANDS.

EXEMPTION OF HOMESTEAD FROM JUDICIAL SALE.

1. One who has acquired land as a homesteader under Rev. Stat. U. S., § 2296, may recover possession of the land from one who purchased at a sale under an execution following a judgment based on a debt contracted prior to the actual issuing of the patent, although evidenced by a note executed after its issuance.—*Schultz v. Levy*, 373.

SURVEYS—MEANDERED LINES—BOUNDARY.

2. Where a government surveyor fails to include large tracts of land lying between the meander line as run and the stream, the patents for lots along such line, though referring for identification to the official plat of such survey, which represents the meander line as the border of the water, are grants only to the meander line actually run.—*Barnhart v. Ehrhart*, 274.

PUBLIC LANDS—CONCLUDED.

DISPUTABLE PRESUMPTION—GOVERNMENT SURVEY.

8. Under the general presumption that official duty has been performed, it will be supposed that a line appearing on a government map was by the official who surveyed the ground actually run as shown, but this may be disputed.—*Barnhart v. Ehrhart*, 275.

INDIAN LANDS—POWER OF SECRETARY OF INTERIOR.

4. The Secretary of the Interior has no power to cancel a lease of land that has been allotted to an Indian, and by him leased pursuant to the prescribed regulations with the approval of such secretary, and this for at least three reasons: (1) The lessee has acquired a vested interest of which he cannot be deprived without some legal proceeding; (2) the power to cancel has not been conferred on the secretary by Congress, and (3) the exercise of this unwarranted authority is not necessary for the protection of the Indians or the public, since the courts afford appropriate relief in cases of wrong.—*Mosgrove v. Harper*, 252.

ADVERSE POSSESSION.

5. An adverse possession of public land, with a claim of exclusive title thereto as a homestead, for more than ten years, except as against the United States, vests a perfect title in the occupant, as against one who had obtained a patent before such occupancy.—*Fellows v. Evans*, 30.

WATERS.

6. The reservation of vested rights of the owners of ditches, provided for by Hill's Ann. Laws, §§ 4057-60, on the issue of patents for land by the state, is not the grant of a new easement, but the recognition of a pre-existing right.—*Curson v. Gentner*, 512.

PUBLIC OFFICIALS. Same as OFFICERS.

QUESTIONS FOR JURY. See TRIAL, 21.

RAPE.

Duplicious Indictment—Surplusage After Verdict. See CRIM. LAW, 15, 17.

RATIFICATION OF CONTRACT

By Payments as Therein Provided for. See SCHOOLS, 7.

Power of County Officers to Ratify Illegal Contract. See AGENTS, 1.

Example of Ratification by Principal. See AGENTS, 3.

REAL PROPERTY.

Sufficiency of Description to Identify Tract Conveyed. See DEED, 2.

Meander of Government Survey—Boundaries. See PUBLIC LANDS, 2.

REDIRECT EXAMINATION. See TRIAL, 12, 13.

REFRESHING MEMORY. See WITNESSES, 9.

REMEDY AT LAW.

Estoppel Against This Defense in Equity. See ESTOPPEL, 1.

Remedy by Action—Jurisdiction of Equity. See EQUITY, 3.

REPLEVIN.

NATURE OF CLAIM AND DELIVERY ACTION.

1. The common law action of replevin is reproduced in the statutes of Oregon without material change in form under the name of claim and delivery.—*Kimball v. Redfield*, 292.

NECESSARY ALLEGATION OF COMPLAINT.

2. A complaint in an action of claim and delivery must show that plaintiff was entitled to the possession of the chattels when the action was commenced.—*Kimball v. Redfield*, 292.

3. An allegation in a replevin complaint that at a certain time before the commencement of the action plaintiff was the owner and entitled to the immediate possession of the property in question, and that defendant "still unlawfully and wrongfully retains the possession thereof" does not show that plaintiff was entitled to the immediate possession when the action was commenced.—*Kimball v. Redfield*, 292.

REPLEVIN—CONCLUDED.

"OWNER" IN REPLEVIN ACTIONS.

4. The term "owner" as used in replevin statutes and pleadings means one who has a right to the present possession of the property involved.—*Kimball v. Redfield*, 282.

REPORTER'S NOTES.

Errors Cannot be Assigned on Notes of Trial. See APPEAL, 13.

REPRESENTATIONS. See VENDOR AND PURCHASER, 1.

RES INTER ALIOS ACTA. *Perham v. Portland Electric Co.*, 475.

RES IPSA LOQUITUR. *Perham v. Portland Electric Co.*, 474.

RESULTING TRUST. See TRUSTS.

RETURN OF OFFICERS.

May be Contradicted in Equity. See SHERIFFS, 1.

Sufficiency of Return of Service as to Venue. See SHERIFFS, 2.

REVIEW. Same as WRIT OF REVIEW.

REVISED STATUTES OF UNITED STATES Cited in this volume.

441 }
462 } *Mosgrove v. Harper*, 253.
463 }

2206 *Schultz v. Levy*, 373.

2339 *Carson v. Gentner*, 512.

26 *Statutes United States*, 795. *Mosgrove v. Harper*, 252.

ROADS.

Description of Location in Petition. See HIGHWAYS, 1, 2, 3, 4.

Presenting Petition—Sufficiency of Notice—Venue. See HIGHWAYS, 9.

Evidence of Posting Notices in Public Places. See HIGHWAYS, 10.

Collateral Attack on Proceedings to Establish. See HIGHWAYS, 8.

RULES OF COURT.

DISMISSING APPEAL—FILING BRIEFS.

1. Where there has been notable delay in filing briefs beyond the time limited by the rules, and no satisfactory explanation thereof is given, the case will be dismissed.—*Blank v. Walker*, 372.

2. Appellant, having failed to file an abstract or brief because the same questions were involved in another case pending on appeal, may, on the other case being dismissed, be relieved from failure to file them as required by the rules of court, and the case be heard on the briefs in the other case and such others as either party may file.—*Garnsey v. County Court*, 201.

EXCUSE FOR FAILURE TO FILE BRIEFS.

3. The practice as to allowance of time for filing briefs under rule 6 should be liberal, but the fact that co-counsel, or counsel and client, were disputing as to who should print the brief will not excuse failure to comply with the rules.—*Reynolds v. Jackson County*, 422.

SALES.

TITLE TO CHATTELS SOLD ON CONDITIONAL CONTRACT.

A sale and delivery of chattels on a contract reserving title in the vendor until the entire purchase price is paid, does not pass title to the vendee.—*Schneider v. Lee*, 578.

SCHOOLS AND SCHOOL DISTRICTS.

SCHOOLS—RATIFICATION OF CONTRACT.

1. A contract executed by the directors of a school district or part of them, without the formalities required by statute will be considered ratified where the entire board comply with its terms for an appreciable time.—*Graham v. School District*, 283.

SCHOOLS AND SCHOOL DISTRICTS—CONCLUDED.

SCHOOLS—ACT OF DE FACTO DIRECTOR.

2. A school director who continues to act as such after he has moved out of the district will be considered a *de facto* officer in so far as his acts may affect third persons.—*Graham v. School District*, 233.

SECONDARY EVIDENCE. When not Admissible. See TRIAL, 15.

SECRETARY OF STATE.

Duty in Certifying Nominees for Election. See OFFICERS, 2.

SECRETARY OF THE INTERIOR.

Power to Cancel Lease of Allotted Indian Lands. See UNITED STATES, 1.

SERVICE.

By Mail—Residence of Parties. See SUMMONS, 3.

SESSION LAWS of Oregon Considered in this Volume.

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|------|--|
| 1889 | p. 135, <i>Garnsey v. County Court</i> , 201. |
| | p. 22, <i>Sears v. Kincaid</i> , 215. |
| 1891 | p. 153, § 4, <i>Miller v. Medical Board</i> , 9-10. |
| | p. 182, <i>Dayton v. Board of Equalization</i> , 131. |
| 1898 | p. 63, <i>State v. Gardner</i> , 149. |
| | p. 133, <i>Stemmer v. Scottish Insurance Co.</i> , 65-71-73. |
| 1895 | p. 67, <i>State v. Lee</i> , 507. |

SHERIFFS AND CONSTABLES.

CERTIFICATE OF SERVICE—VENUE.

1. A constable's return of the service of a notice of appeal is insufficient where it specifies that the service was made within a certain county and state, but fails to show that it was made within the constable's own precinct.—*Herrmann v. Hutcheon*, 239.

VERITY OF RETURN ON PROCESS.

2. The return of an officer on process delivered to him for service is *prima facie* correct but it may be contradicted in equity.—*Huntington v. Crouter*, 404.

SHORTHAND REPORTER.

Assignment of Error on Reporter's Notes. See APPEAL, 13.

SIGNATURES.

Both Parties Become Bound by Signing an Offer. See CONTRACTS, 5.

SPECIFIC PERFORMANCE.

DEFECTIVE TITLE TO SMALL PORTION OF LAND.

A court of equity will require specific performance by a purchaser, although the vendor is unable to give title to ten acres out of a tract of 224, where the portion to which the defective title appertains does not affect the value and reasonable enjoyment of the remainder for the purpose for which it was intended, and the vendor consents to a ratable reduction in the price.—*McBurt v. Johns*, 561.

STATE CONSTITUTION.

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|-------------|---|---|
| Article I. | { | Section 11, { <i>State v. Hinkle</i> , 97. |
| | | { <i>State v. Branton</i> , 533. |
| | | Section 12, <i>State v. Bartmess</i> , 121. |
| | | Section 18, { <i>Towns v. Klamath County</i> , 225. |
| | | { <i>Sullivan v. Cline</i> , 261. |
| Article IX, | section 1, <i>Dayton v. Board of Equalization</i> , 148. | |
| Article XI, | section 10, <i>Municipal Security Co. v. Baker County</i> , 333, 339. | |

STATUTE OF FRAUDS.

MUTUALITY—CONTRACT IN WRITING.

1. A contract signed by S. and I., reciting that they enter into an agreement whereby S. agrees to deliver a certain pasture to I. for \$100 per year for a stated time, S. also to deliver to I. during said time all over a certain amount of hay raised each year on certain land, for \$10 per ton, and I. agrees that S. can have the use of certain land,—satisfies the statute of frauds as to the agreement of I. to take and pay for the pasture and hay.—*Stubblefield v. Imbler*, 446.

TRUST EX MALEFICIO.

2. A trust *ex maleficio*, which is not within the statute of frauds, arises where a person, with the intent to eventually appropriate, obtains the legal title to property by representing that it will be managed and held in trust for the grantor: but where the grantee, although honestly intending when the title is taken to carry out the trust, afterward forms the design of defrauding the grantor, the trust is within the statute and must be in writing.—*Parrish v. Parrish*, 486.

- 98 Hayden v. Pearce, 89.
- 182 Kimball v. Redfield, 294.
- 244 } Hayden v. Pearce, 91.
- 245 }
- 309 } Perham v. Portland Electric Co., 451.
- 371 }
- 414 } Security Savings Co. v. Mackenzie, 209.
- 504 }
- 528 } Flisk v. Hunt, 424.
- 529 }
- 597 } Subd. 1, Hamilton v. Butler, 370.
- 543 } Re Plunkett's Estate, 416.
- 544 }
- 545 } Farmer's Bank v. Key, 443.
- 546 } Subd. 3, Re Plunkett's Estate, 416.
- 585 } Dayton v. Board of Equalization, 131.
- 591 } Garnsey v. County Court, 201.
- 598 } Garnsey v. County Court, 201.
- 838 } State v. Bartmess, 114, 115.
- 840 } First National Bank v. Commercial Assurance Co., 48, 52.
- 841 } State v. Welch, 40-42.
- 842 } State v. Bartmess, 117.
- 852 } First National Bank v. Commercial Assurance Co., 48-52.
- 896 } McCourt v. Johns, 501.
- 902 } Subd. 1, Municipal Security Co. v. Baker County, 339.
- 1000 } Re Plunkett's Estate, 416.
- 1068 } Knight v. Hamaker, 154.
- 1100 }
- 1273 } State v. Hinkle, 95-97.
- 1289 } State v. Lee, 506.
- 1314 } State v. Branton, 533.
- 1320 } Subd. 2, State v. Smith, 485.
- 1322 } State v. Branton, 550.
- 1330 } State v. Lee, 507.
- 1331 } State v. Lee, 506.
- 1365 } State v. Branton, 550.
- 1372 } State v. Bartmess, 121-124.
- 1408 } State v. Renick, 584.
- 1427 } *Ex parte* McGee, 165.
- 1430 } State v. Minnick, 158.
- 1733 } State v. Lee, 507.
- 1777 } State v. Renick, 584.
- 1839 } State v. Ash, 88.
- 2011 } State v. Branton, 533.
- 2129 } Gobbi v. Refrano, 28.
- 2131 } *Ex parte* McGee, 165.
- 2327 } Subd. 3, Gibbons v. Moody, 563.
- 2405 } Municipal Security Co. v. Baker County, 351.
- 2406 }
- 2547 } Breeding v. Williams, 383.

STATUTE OF FRAUDS—CONCLUDED.

2769	}	Dayton v. Board of Equalization, 131, 143, 148.
2770		
2776		
2776		
2848	}	Re Assignment of Woodall, 382.
3180		
3577		
3587		
3587	}	Stemmer v. Scottish Insurance Co., 65, 71, 73.
3832		
4067		
4067		
4068	}	Carson v. Gentner, 512.
4069		
4090		
4090		
4092	}	Towns v. Klamath County, 229.
4093		
4074		
4075		
4076	}	Towns v. Klamath County, 225, 226.
4077		
4078		
4079		
4140	}	Sweek v. Jorgensen, 270.
4140		
4140		
4140		
4140	}	Municipal Security Co. v. Baker County, 889.
4140		
4140		
4140		

SESSION LAWS.

1889	}	p. 136, Garnsey v. County Court, 201.
1889		
1891		
1891		
1891	}	p. 22, Sears v. Kincaid, 215.
1891		
1891		
1891		
1893	}	p. 153, § 4, Miller v. Medical Board, 9-10.
1893		
1893		
1893		
1893	}	p. 182, Dayton v. Board of Equalization, 131.
1893		
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1893	}	p. 63, State v. Gardner, 149.
1893		
1893		
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1895	}	p. 133, Stemmer v. Scottish Insurance Co., 65, 71-73.
1895		
1895		
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1895	}	p. 67, State v. Lee, 507.
1895		
1895		
1895		

REVISED STATUTES OF UNITED STATES.

441	}	Mosgrove v. Harper, 253.
462		
463		
463		
2296	}	Schultz v. Levy, 373.
2296		
2339		
2339		
26	}	Carson v. Gentner, 512.
26		
26		
26		
26	}	Stat. U. S., 735, Mosgrove v. Harper, 252.
26		
26		
26		

STATUTES AND STATUTORY CONSTRUCTION.

MEANING OF WORDS USED IN THE INSURANCE STATUTES.

1. The words "full amount of such loss," as used in section 3577 of Hill's Ann. Laws, and the expression "damages sustained" found in the fire insurance act of 1883, unquestionably mean indemnity.—*Stemmer v. Scottish Insurance Co.*, 65.

CONSTRUCTION OF STATUTES CONFIRMING WATER RIGHTS.

2. The local customs and decisions of western states that he who first diverts to some useful purpose the waters of a natural stream flowing through public lands, thereby acquires a superior right to the same against every claimant except the United States, constitute a modification of the common law, which has been confirmed by both state and national legislation: Hill's Ann. Laws, § 3832 and Rev. Stat. U. S. § 2339.—*Carson v. Gentner*, 512.

CONSTRUCTION OF EXEMPTION LAWS.

3. Exemption statutes have no extra territorial operation, and do not form any part of the contract between debtor and creditor, being merely a part of the remedy.—*Bond v. Turner*, 351.

IMPRISONMENT FOR FAILURE TO PAY FINE.

4. Under sections 2131 and 1408, Hill's Ann. Laws, a justice of the peace may order a defendant imprisoned if his fine is not paid.—*Ex parte McGee*, 165.

STENOGRAPHIC NOTES.

Error Cannot be Assigned on Reporter's Notes. See APPEAL, 13.

SUMMONS.

RETURN ON SUMMONS AS EVIDENCE.

1. An officer's return on a summons delivered to him for service is *prima facie* evidence of the material matters therein stated, but it may be contradicted.—*Huntington v. Crouter*, 408.

SUMMONS—CONCLUDED.

AMENDING RETURN—IMPEACHING AFFIDAVITS.

2. In determining whether an amendment should be allowed to a return of service the court may consider affidavits showing that a sufficient return cannot truthfully be made.—*Fisk v. Hunt*, 524.

SERVICE BY MAIL—RESIDENCE OF DEFENDANT.

3. Under Hill's Ann. Laws, §§ 528, 529, providing that service by mail may be made when the persons for and on whom it is made reside in different places, between which there is communication by mail, such a service is ineffectual where the copy was mailed at the place of residence of the person on whom it was to be made.—*Fisk v. Hunt*, 524.

SUPREME COURT.

Practice on Remanding Cause—Amendment. See COURTS, 6.

SURPRISE.

Waiver by Not Asking a Continuance. See NEW TRIAL, 2.

SURVEYS.

Government Surveys—Meandered Lines—Patents. See PUBLIC LANDS, 2.

Presumption as to Location of Line. See PUBLIC LANDS, 3.

TAXATION.

JURISDICTION OF STATE BOARD OF EQUALIZATION—RECORD.

1. The jurisdiction of the State Board of Equalization established by laws, 1891 (p. 182), pertains only to the equalization of the assessment of property to secure uniformity in valuations between the different counties of the state, and its functions are exercised in a summary manner. There are no parties to its proceedings, nor does it act *in rem*, and a record is not essential to the establishment of jurisdiction of person or thing. So far as county rolls are concerned the only record provided for is a tabulated statement of the abstracts of the county rolls, prepared by the secretary of the board. It is not necessary that the rolls themselves be before the board or even on file in the office of the Secretary of State.—*Dayton v. Board of Equalization*, 131.

CHARACTER OF STATE BOARD.

2. The State Board of Equalization has advisory but not appellate powers. It is merely part of the machinery for equalizing taxes between the various counties.—*Dayton v. Board of Equalization*, 131.

IRREGULARITY—COUNTY ROLLS.

3. It was merely a harmless irregularity that the board of equalization did not have before it the certified copy of the assessment roll of one county, where the record of the board shows that it acted upon an abstract of such county's roll, and that it actually equalized the assessments of such county at the same time with all the other counties.—*Dayton v. Board of Equalization*, 131.

IRREGULAR CLASSIFICATION—HARMLESS ERROR.

4. Although the statute (Hill's Ann. Laws, §§ 2770 and 2776) divides real property into only two classes for the purposes of taxation, viz., platted and rural land, it is not a fatal irregularity in the county assessment rolls if the former class is subdivided into "lots" and "improvements on lots." The state equalization board may properly add the two sets of values, making thereby a single class of the kind indicated by the statute, and then equalize it.—*Dayton v. Board of Equalization*, 131.

POWER OF STATE BOARD TO CORRECT COUNTY ASSESSMENTS.

5. The State Board of Equalization has no power to correct errors of county assessors or county boards of equalization. Its functions are exercised entirely in adjusting the relative rights of counties.—*Dayton v. Board of Equalization*, 131.

EQUALITY OF TAXATION REQUIRES UNIFORMITY OF CLASSIFICATION.

6. To enable the State Board of Equalization to secure proportional or uniform values among all the counties in the state, as contemplated by the Oregon statutes, there must be a uniformity of classification; and the board has no authority to increase the assessment upon a particular class of personal property in one county where the assessment roll of another county does not recognize such particular class.—*Dayton v. Board of Equalization*, 131.

TAXATION—CONCLUDED.

ASSESSMENT—CHANGE BY COUNTY COURT.

7. A county court cannot *sua sponte* change an assessment. Its power is limited to completing the work left unfinished by the board of equalization.—*French v. Harney County*, 418.

TENANCY IN COMMON.

When not Between Landlord and Tenant. See LANDLORD AND TENANT, 2.

TENDER.

COSTS.

1. A failure of a vendor to make tender of a performance before instituting suit to foreclose the equitable interest of the vendee under a bond can only affect the question of costs; and, if such failure is not made a defense, the costs should abide the result.—*Security Savings Company v. Mackenzie*, 209.

SUFFICIENCY OF TENDER.

2. While section 852 of Hill's Ann. Laws makes a written offer to pay a particular sum, if not accepted, equivalent to an actual production and tender of the money, it does not dispense with readiness and ability to make the tender good.—*McCourt v. Johns*, 561.

THREATS.

Instruction on Considering Threats. See CRIMINAL LAW, 20.

TRANSCRIPT.

Filing in Supreme Court—Pendleton and Salem Terms—Dismissing Appeal. See APPEAL, 14.

TRESPASS.

PLEADING AND PROOF.

In trespass, where land is described as a particular lot, without giving metes and bounds, the evidence must be confined solely to that lot, and will not include trespass on other realty belonging to plaintiff.—*Barnhart v. Ehrhart*, 274.

TRIAL.

POWER OF COURT TO CONTROL TESTIMONY.

1. Under the general power to control the conduct of a case a judge may *sua sponte* withdraw improper testimony from consideration by the jury, or may limit its application, particularly where counsel were notified on offering the testimony that such a ruling might be made at the conclusion of the trial.—*First National Bank v. Home Insurance Company*, 234.

ALLEGATA ET PROBATA.

2. An allegation that fire was negligently taken from defendant's engine used for threshing and placed upon the ground in and about the stubble, from which it communicated to and consumed plaintiff's property is not sustained by evidence that defendants were negligent in not properly extinguishing the fire after it had been properly taken from the engine. WOLVERTON, J., dissents.—*Lieuallen v. Mosgrove*, 282.

FAIRNESS OF INSTRUCTIONS.

3. A statement by the judge, preliminary to his instructions, that the parties had agreed on the law of the case, and that he would give certain instructions presented by defendant, does not give undue prominence to defendant's case.—*First National Bank v. Fire Association*, 173.

SLIGHT INACCURACY OF INSTRUCTION.

4. Verbal inaccuracy of a charge to the jury will not require a reversal, if the charge as a whole fairly and accurately presents the law applicable to the facts.—*State v. Bartmess*, 110; *Perham v. Portland Electric Company*, 451.

MISLEADING INSTRUCTION.

5. An instruction is not erroneous because it uses unusual or peculiar references for illustration if it is not calculated to mislead an intelligent jury.—*First National Bank v. Fire Association*, 173.

TRIAL—CONTINUED.

INCONSISTENT INSTRUCTIONS.

6. Appellant cannot complain of the inconsistency of different instructions where the inconsistency resulted from the giving of instructions proffered by him.—*Mullaney v. Evans*, 331; *State v. Branton*, 533.

SPECIAL CHARGES.

7. It is not error to refuse requests for special charges, the substance of which was given in the general charge.—*State v. Branton*, 533.

PROVINCE OF JURY:

8. In an action on an insurance policy, where defendant accused insured of destroying the property, instructing the jury to consider the improbability that one will commit such an act as an element necessarily involved, does not invade the province of the jury.—*First National Bank v. Commercial Assurance Company*, 43.

9. An instruction, in an action upon an insurance policy where the defense is that the property was destroyed by a fire set by the procurement of the insured, that the improbability that a person will commit an act of a criminal nature raises a natural presumption of innocence is not invasive of the province of the jury.—*First National Bank v. Commercial Assurance Company*, 43.

DIFFERENT DEGREES OF PROOF—CIVIL AND CRIMINAL CASES.

10. In an action on a policy of insurance where the defense is arson by the insured it is not improper for the court to point out to the jury the difference between the degrees of proof required in civil and criminal cases, and state that in a civil case there is no question whether a crime has been committed, and that a verdict for either party could not be used against the other in any criminal prosecution—such statements are intended merely to caution the jury against allowing the criminal phase of the case to influence their verdict.—*First National Bank v. Fire Association*, 173.

COURT MUST MAKE FINDINGS OF FACT.

11. It is the imperative duty of a law court *sua sponte*, when hearing a cause without a jury, to make findings of fact on all the material issues presented by the pleadings.—*Breding v. Williams*, 301.

EXAMINATION OF WITNESSES.

12. A witness cannot on redirect examination be asked whether he had any reason to doubt that a specified defendant was a partner in the firm which executed the notes in suit, where there was nothing in the cross-examination to call out such a question.—*Farmer's Bank v. Saling*, 395.

13. Where a party on cross-examination brings out matters not testified to on direct, he cannot complain of the witness being examined as to such matters on redirect.—*Farmer's Bank v. Saling*, 394.

BIAS OF WITNESS—LIMIT OF CROSS-EXAMINATION.

14. While it is always competent to show the feeling entertained by a witness toward a person about whom he is testifying such inquiry must be limited to the feeling for or against that person.—*State v. Welch*, 33.

RULE FOR ADMITTING SECONDARY EVIDENCE.

15. Secondary evidence of a transfer of personal property by bill of sale is inadmissible unless a reasonable excuse is given for not producing the writing.—*Price v. Woffor*, 15.

WHEN NONSUIT SHOULD BE REFUSED.

16. The only question for the consideration of the court on a motion for nonsuit is whether there is any evidence from which the jury can reasonably conclude that the facts sought to be proved are established, and in determining such question it must assume as true every fact which the jury could properly find from the evidence.—*Barr v. Ruder*, 375.

17. There was evidence that the insured property was a stock of goods that was in some respects unsalable, and that insured was financially embarrassed; that, within five minutes after insured left the store, it was on fire in both stories, and almost immediately iron doors and shutters burst out by an explosion, and the fire burned with unusual fury. *Held*, sufficient to require the case to be submitted to the jury.—*First National Bank v. Fire Association*, 173.

TRESPASS—PLEADING AND PROOF.

18. In trespass, where land is described as a particular lot, without giving metes and bounds, the evidence must be confined solely to that lot, and will not include trespass on other realty belonging to plaintiff.—*Barnhart v. Ehrhart*, 274.

TRIAL—CONCLUDED.

VALUE OF EVIDENCE.

19. Where a witness testifies to facts as of his own knowledge, and on cross-examination it appears that the sources of his knowledge are meager, his testimony will not be stricken out; its value being for the jury.—*Farmer's Bank v. Saling*, 385.

MOTION FOR VERDICT IS A DEMURRER TO THE EVIDENCE.

20. A request to direct a verdict is equivalent to a demurrer to the evidence, and a review thereof is governed by the rules applicable to a motion for nonsuit.—*First National Bank v. Fire Association*, 173.

QUESTION FOR JURY—CARE TO AVOID INJURY.

21. Whether a person exercised due care to prevent injury from electric wires is a question for the jury.—*Perham v. Portland Electric Co.*, 461.

OVERRULING MOTION FOR JUDGMENT NON OBSTANTE.

22. Under the rule here established that an objection to a complaint because it does not state a cause of action is never waived, it is immaterial whether a court erred or was correct in overruling a motion for judgment *non obstante* after disposing of a demurrer which raised the same point.—*Hargett v. Beardley*, 301.

DISQUALIFICATION OF JURORS FOR BIAS.

23. The fact that proposed jurors stated on their *votr dire* that they had read an account of the inquest held over the body of the person for whose murder defendant was on trial, which purported to give the testimony of witnesses before the coroner's jury, and the verdict of such jury, and that they had heard the matter discussed, and, from what they had read and heard, had formed some opinion as to the guilt or innocence of defendant, will not disqualify them if it appears that the opinion was not of a fixed and determined character.—*State v. Olberman*, 558.

MISCONDUCT OF JURY.

24. The fact that jurors drink intoxicating liquors during the trial will not invalidate a conviction even in a capital case, unless it appears that such drinking probably affected their verdict.—*State v. Olberman*, 556.

25. The mere fact that the direction of the court that the jury be kept together during the progress of the trial has been violated is not cause for reversal, if it appears that their verdict was not improperly influenced.—*State v. Olberman*, 556.

NEW TRIAL—SURPRISE.

26. A new trial will not be granted on the ground of surprise where the party surprised failed to move immediately for a continuance and waited until after the verdict was rendered before making any effort to guard against the effects of the surprise.—*State v. Gardner*, 150.

REFRESHING MEMORY BY MEMORANDUM.

27. Stenographic notes made at a preliminary examination may be used to refresh the memory of the person who made them to contradict the testimony of a witness, where a proper foundation therefor has been laid.—*State v. Bartmess*, 110.

TRUSTS AND TRUSTEES.

TRUST EX MALEFICIO—STATUTE OF FRAUDS.

A trust *ex maleficio*, which is not within the statute of frauds, arises where a person, with the intent to eventually appropriate, obtains the legal title to property by representing that it will be managed and held in trust for the grantor; but where the grantee, although honestly intending when the title is taken to carry out the trust, afterwards forms the design of defrauding the grantor, the trust is within the statute and must be in writing.—*Parrish v. Parrish*, 486.

ULTRA VIRES Acts of Cities. See MUNICIPAL CORPORATIONS, 2, 7.

UNITED STATES.

INDIAN LANDS—POWER OF SECRETARY OF INTERIOR.

The Secretary of the Interior has no power to cancel a lease of land that has been allotted to an Indian, and by him leased pursuant to the prescribed regulations and with the approval of such secretary, and this for at least three reasons: (1) The lessee has acquired a vested interest of which he cannot be deprived without some legal proceeding, (2) the power to cancel has not been conferred on the secretary by Congress, and (3) the exercise of this unwarranted authority is not necessary for the protection of the Indians or the public, since the courts afford appropriate relief in cases of wrong.—*Mosgrove v. Harper*, 252.

UNITED STATES CONSTITUTION.

Article XIV, section 1 { *Towns v. Klamath County*, 225.
 Sullivan v. Cline, 211.

VENDOR AND PURCHASER.

FRAUDULENT CONDUCT OF VENDOR.

1. A grantor is not chargeable with false and fraudulent representations concerning the title to land conveyed, although he said the title was perfect, when all the facts within his knowledge were communicated to the grantee prior to the purchase, since his statement was but an expression of opinion based on such facts.—*Fellows v. Evans*, 30.

REMEDY FOR FAILURE OF TITLE.

2. In the absence of fraud, an executed sale of real estate will not be rescinded for failure of title, but the purchaser must look for protection to the covenants of the deed.—*Fellows v. Evans*, 30.

REMEDY FOR FAILURE OF TITLE.

3. The fact that after the conveyance of a tract of land settled upon as a homestead, where final proof had been made and accepted and final certificate had issued, it is discovered that the land had been patented by mistake to another before it was settled upon by the homestead claimant will not support a suit to rescind the sale, and recover the purchase money, since the defect is but a failure of title for which the remedy is by suit upon the covenants of the deed.—*Fellows v. Evans*, 30.

RESCISSION OF CONTRACT OF SALE FOR FAILURE OF TITLE.

4. A vendee will not be allowed to rescind a contract for the sale of land where the vendor, without fraud or neglect, is unable to convey title to an insignificant portion, not essential to the enjoyment of the balance for the purpose intended, and it cannot be said that but for such portion the vendee would not have made the contract.—*McCurt v. Johns*, 561.

LIENS.

5. A purchaser cannot rescind his contract for the purchase of land because there are liens upon it amounting to less than the purchase price, since he could retain their amount from the purchase money, and especially so where this necessity is obviated by a tender of proper releases.—*McCurt v. Johns*, 561.

LACHES

6. Where the vendee of land, in possession under a bond for a deed, retains possession without complaint for a long period of time after learning that the vendor is unable to convey title to an insignificant portion of the land sold, and until the time of performance on his part arrives, such laches will generally constitute a waiver of the right to rescind.—*McCurt v. Johns*, 561.

VOLUNTARY INDEBTEDNESS of Counties.

Shelving—Insurance—Bridges—County Buildings—Toll Roads—Scalp Bounties—Purchase of Poor Farm—Copying Public Records—Experting County Books. See COUNTIES, 3, 4, 5, 6, 7, 8, 9.

WAIVER. See also ESTOPPEL.

ESTOPPEL TO DENY EQUITABLE JURISDICTION.

1. An objection in an equity suit that plaintiff has an adequate remedy at law cannot be raised by a defendant who has by his own answer asked equitable relief.—*Municipal Security Company v. Baker County*, 338.

INCUMBRANCES—WAIVER OF CONDITIONS OF POLICY.

2. Where, in the course of the negotiation of a preliminary agreement for the issuance of a policy, no inquiry is made touching incumbrances, and no intimation is given applicant that they would affect the insurance, the denial of the agreement and the withholding of the policy by the company waives a condition in the policy against incumbrances.—*Sproul v. Western Assurance Co.*, 98.

WAIVER OF PROOFS OF LOSS.

3. A denial of an oral contract to insure followed by a refusal to deliver a policy, is a waiver of any condition or rule requiring proofs of loss.—*Sproul v. Western Assurance Company*, 98.

WAIVER OF OBJECTION TO ARBITRATOR.

4. Where a party to an arbitration knows at the time the other party selects its arbitrator that he is a nonresident, a failure to object will be deemed a waiver of that objection.—*Stemmer v. Scottish Insurance Company*, 65.

WAIVER—CONCLUDED.**WAIVER OF RIGHTS—SURPRISE.**

5. Where a party did not move for a continuance at the time an alleged surprise occurred, but waited until after a verdict, he waived the objection.—*State v. Gardner*, 150.

IRREGULARITIES OF SERVICE—GENERAL APPEARANCE.

6. By appearing without objection and contesting a case on its merits irregularities of service of orders or process is waived.—*Towns v. Klamath County*, 226.

ACCEPTING BENEFIT OF DECREE AS A WAIVER OF RIGHT TO APPEAL.

7. Pending the hearing of a case on its merits the appellate court will not make an order allowing appellant, without prejudice to his right of appeal, to draw from the clerk of the trial court the money that respondent had deposited there under the decree appealed from, where the acceptance of the money without such an order would have been a waiver of the right to appeal.—*Glemmer v. Scottish Insurance Company*, 66.

WARRANTS.

For Voluntary County Indebtedness are Void. See COUNTIES, 3, 4, 5, 6, 7, 8, 9.

For More Than the Amount Due. See COUNTIES, 10.

WATERS AND WATER RIGHTS.**APPROPRIATION UNDER LOCAL CUSTOMS—STATUTES.**

1. The local customs and decisions of Oregon and other western states that he who first changes the course of a natural stream flowing through public lands, which at the time was common to all, and appropriates the water to some useful purpose, thereby acquires a superior right to the same against every claimant except the United States, constitute a modification of the common law, which has been confirmed by both state and national legislation.—Hill's Ann. Laws, § 3832 and Rev. Stat.U. S. § 2339.—*Curson v. Gentner*, 512.

RESERVATION OF VESTED WATER RIGHTS.

2. The reservation of vested rights of the owners of ditches provided for by Hill's Ann. Laws, §§ 4037-60, on the issue of patents for land by the state, is not the grant of a new easement, but the recognition of a pre-existing right.—*Curson v. Gentner*, 512.

RIGHT OF PRIOR APPROPRIATOR.

3. A prior appropriator of water from a natural stream flowing through state lands has such a vested right to the use of the water, and to the ditch in which it flows, also constructed on said lands, as will defeat the claim of one who, with notice of the diversion and existence of the ditch, obtains from the state a deed for the premises, without reservation of any water right.—*Curson v. Gentner*, 512.

DITCH EASEMENT.

4. A prior appropriator who owns a ditch across lands subsequently patented by the state to another person, has the right to enter on such lands to clean and repair the ditch.—*Curson v. Gentner*, 512.

WITNESSES.**SUFFICIENT FOUNDATION FOR IMPEACHMENT.**

1. Evidence as to the good reputation of a witness for truth, veracity and fair dealing is not admissible when his general character is not assailed, although the case may turn upon the credit given to his testimony.—*First National Bank v. Commercial Assurance Co.*, 43.

PROPER CROSS-EXAMINATION.

2. Where a party on cross-examination brings out matters not testified to on direct, he cannot complain of the witness being examined as to such matters on redirect.—*Farmer's Bank v. Saling*, 394.

IMPROPER CROSS-EXAMINATION.

3. A witness cannot on redirect examination be asked whether he had any reason to doubt that a specified defendant was a partner in the firm which executed the notes in suit, where there was nothing in the cross-examination to call out such a question.—*Farmer's Bank v. Saling*, 395.

WITNESSES—CONCLUDED.**IMPEACHMENT—CONTRADICTORY STATEMENTS.**

4. For the purpose of depreciating the value of a witness' testimony it may be shown, on proper foundation, that the person has made out of court statements on the matter in question contradicting his evidence in court.—*Farmer's Bank v. Saling*, 385.

PLACE WHERE CONVERSATION OCCURRED.

5. The attention of a witness need not be called to any particular place in a small hamlet in an interrogatory made as a foundation for impeaching him by evidence of contradictory statements, especially where the witness admits meeting in such hamlet the person to whom the contradictory statements are alleged to have been made.—*State v. Welch*, 33.

DATE OF STATEMENTS.

6. Where it is intended to impeach witness by showing contradictory statements the error of omitting from the impeaching question the date of the statements is cured by the answer of the witness showing that he understands the question.—*State v. Welch*, 33.

IMPEACHING QUESTION—PERSONS PRESENT.

7. Where it is desired to lay a foundation for impeaching a witness by contradictory statements theretofore made, it is not necessary to name all the persons who were present. It will be sufficient to designate a few of them, especially where the contradictory statements were made in public, and then anyone who heard them may testify.—*State v. Bartness*, 110.

IMPEACHING ONE'S OWN WITNESS.

8. Where a witness gives testimony which is unexpected, the court may, in its discretion, permit the party calling him to direct the attention of the witness to circumstances of time, place, and persons present, to refresh his memory as to alleged contradictory statements; and where such witness answers in an equivocal manner, and seemingly tries to shade his testimony to the advantage of the other party, such statements made by him at another time may be given, not as substantive proof, but by way of explanation.—*State v. Bartness*, 110.

REFRESHING MEMORY FROM MEMORANDA.

9. Stenographic notes made at a preliminary examination may be used to refresh the memory of the person who made them to contradict the testimony of a witness, where a proper foundation therefor has been laid.—*State v. Bartness*, 110.

BIAS OF WITNESS—LIMIT OF CROSS-EXAMINATION.

10. While it is always competent to show the feeling entertained by a witness toward a person about whom he is testifying, such inquiry must be limited to the feeling for or against that person.—*State v. Welch*, 33.

WITNESS' FEES AS COSTS.

11. A party who is entitled to his costs may recover as disbursements the mileage and per diem of a material witness, residing in the state, who attended the trial at his request, but without having been served with a subpoena.—*Perham v. Portland Electric Company*, 451.

DUTY OF DISTRICT ATTORNEY TO CALL WITNESSES.

12. The prosecuting attorney is not required to call as witnesses all the persons present at the commission of an alleged crime, or any particular number of them whose attendance can be procured.—*State v. Barrett*, 194.

IMPEACHMENT OF WITNESS—EVIDENCE OF REPUTATION.

13. An attempt to show on cross-examination that a witness has at other times made statements not in harmony with his testimony on the trial is not such an impeachment of his character as to let in proof of his general reputation for truth and veracity.—*First National Bank v. Commercial Assurance Company*, 43.

FOUNDATION FOR IMPEACHMENT.

14. An attempt on cross-examination to show by former declarations that a witness is corrupt is not a sufficient foundation on which to admit testimony of his good reputation for truth and veracity.—*First National Bank v. Commercial Assurance Company*, 43.

WORDS AND PHRASES.**"FULL AMOUNT OF SUCH LOSS."**

These words, as used in section 3577 of Hill's Ann. Laws, relating to fire insurance, mean indemnity.—*Stemmer v. Scottish Insurance Company*, 66.

WORDS AND PHRASES—CONCLUDED.

"IMPLEMENTS OF TRADE."

Stationery and unfilled glove boxes are not included within the term "All other kinds of implements of trade."—*Stemmer v. Scottish Insurance Co.*, 65.

"INFERIOR COURT."

A county court sitting for the transaction of probate business is an "inferior court" whose proceedings may be examined by a writ of review under Hill's Ann. Laws, § 585 as amended (Laws 1880, 135).—*Garnsey v. County Court*, 201.

"OTHER CAUSES" in an insurance arbitration.

The words "other causes," in the report of appraisers to determine the loss under a policy of insurance, stating that they considered the several elements pointed out in the agreement of arbitration which tend to measure the amount of the loss, and "other causes," will, under the maxim *ejusdem generis*, be held to refer to such causes as tend to fix the full amount of the loss, and do not invalidate the award.—*Stemmer v. Scottish Insurance Co.*, 65.

"OWNER" in REPLEVIN ACTIONS.

The term "owner," as used in replevin statutes and pleadings, means one who has a right to the present possession of the property involved.—*Kimball v. Redfield*, 202.

"POINT" in Surveying.

A "point" is a division of a mariner's compass equal to 11°, 15'.—*Hayden v. Brown*, 221.

"PROCEEDING."

An imprisonment for failure to pay a fine is a "proceeding" within the meaning of a section of a city charter providing for "proceedings before the (municipal) court."—*Ex parte McGee*, 165.

WRIT OF REVIEW.

WHEN WRIT OF REVIEW WILL LIE.

1. Where a misjoinder of causes of action appears on the face of the complaint the plaintiff should be required to elect on which cause he will proceed; but when the defect is not apparent until the judgment is entered a writ of review will lie to correct the error.—*Hayden v. Pearce*, 89.

NATURE OF WRIT OF REVIEW.

2. Under section 585 of Hill's Ann. Laws a writ of review is substantially the common law remedy of *certiorari*; it is invoked to determine from an inspection of an entire record whether an inferior tribunal had the jurisdiction which it exercised, or whether it exceeded its jurisdiction, or whether its proceedings were regular.—*Dayton v. Board of Equalization*, 131.

3. Under Hill's Ann. Laws, §§ 585, 591, providing that a writ of review shall be allowed in all cases where the inferior court appears to have exercised its judicial powers erroneously, or to have exceeded its jurisdiction, to the injury of some substantial right, and that the court may affirm, modify, or annul the determination reviewed, the scope of the writ is confined to those cases where jurisdiction has been exceeded, or judicial functions have been exercised in an illegal manner. The writ is still substantially the common law proceeding.—*Garnsey v. County Court*, 201.

REVIEW TO PROBATE COURTS.

4. A county court sitting for the transaction of probate business is an "inferior court" whose proceedings may be examined by a writ of review under Hill's Ann. Laws, § 585 as amended (Laws 1880, 135).—*Garnsey v. County Court*, 201.

5. A writ of review will not lie to revise the action of a probate court in passing on a claim presented against an estate, provided the proceedings are in due form.—*Garnsey v. County Court*, 201.

WRIT OF REVIEW—RECORD.

6. Questions presented by a writ of review must be determined on the record as made by the inferior tribunal; if such record is incorrect it should have been corrected before being certified up.—*French v. Harney County*, 518.

POWER OF COURTS TO CORRECT ASSESSMENTS—REVIEW.

7. The courts cannot, upon a writ of review from the action of the state board of equalization, correct errors and irregularities of the assessors or county boards in making up their assessment rolls.—*Dayton v. Board of Equalization*, 131.

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